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v. 3021

No. 15391

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**United States  
Court of Appeals  
For the Ninth Circuit**

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BENJAMIN B. HOFFMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

**Transcript of Record**

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**Appeal from the United States District Court for the  
District of Arizona**

**FILED**

MAR 12 1957

PAUL P. O'BRIEN, CLERK



No. 15391

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**United States  
Court of Appeals**  
*For the Ninth Circuit*

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BENJAMIN B. HOFFMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**Transcript of Record**

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**Appeal from the United States District Court for the  
District of Arizona**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

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JACK D. H. HAYS,  
United States Attorney;

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Phoenix, Arizona,

Attorneys for Appellee.



In the United States District Court  
for the District of Arizona

No. C-13,999—Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BENJAMIN B. HOFFMAN,

Defendant.

INDICTMENT

Violation: 18 U.S.C.A. 1341 and 1343  
(Mail Fraud; Fraud by Interstate Wire)

The Grand Jury Charges:

Count I.

(18 U.S.C.A. 1343)

On or about the 29th day of May, 1953, Benjamin B. Hoffman, hereinafter called the defendant, devised a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises; that the scheme so devised was substantially as follows: The defendant used the names of two companies, the Hoffman Wholesale Grocery and the Acme Distributing Company, to place orders, outside the State and District of Arizona, on open account with various persons, firms and companies, dealing in food and food products, and in placing the said orders, the defendant represented that the Hoffman Wholesale Grocery or the Acme Distributing Company was

an active and responsible business concern, within the State of Arizona, with good credit rating and that the goods ordered would be paid for promptly in full; that the aforesaid representations and promises were made to induce the persons, firms, and companies receiving them to ship their merchandise to the defendant on credit; that the defendant well knew at the time the aforesaid representations and promises were made that the Hoffman Wholesale Grocery and the Acme Distributing Company were, in fact, not active and responsible business concerns in the State of Arizona, and not possessed of a good credit rating, but in truth and in fact, said companies were dummy business organizations with only nominal assets and created by the defendant to accomplish his scheme; and that the defendant further knew that the goods ordered and shipped to the Hoffman Wholesale Grocery and the Acme Distributing Company would not be paid for promptly in full, and the defendant did not intend to pay for said food and food products received, except to make token payments to induce the sellers thereof to further rely on the false representations and promises previously made; that as a further part of said scheme, the defendant converted said food and food products immediately into cash by selling the same, keeping the proceeds for his own use and benefit.

On or about the 23rd day of November, 1954, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the afore-



said scheme and artifice did, by interstate wire, telephone Long's Date Gardens in Pasadena, California, and place an order for food products, viz., dates, to be delivered to the Acme Distributing Company, Tempe, Arizona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

### Count II.

(18 U.S.C.A. 1343)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 11th day of October, 1954, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone C. A. Glass Company in Los Angeles, California, and place an order for food products, viz., dates, to be delivered to the Acme Distributing Company, Tempe, Arizona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

### Count III.

(18 U.S.C.A. 1341)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 13th day of December, 1954, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the afore-

said scheme and artifice, placed or caused to be placed in an authorized depository for mail matter at Phoenix, Arizona, to be sent and to be delivered by the Postal Establishment of the United States, a certain writing enclosed in a postpaid envelope addressed to Long's Date Gardens, 2600 Foothill Boulevard, Pasadena, California, to wit, cashier's check No. 27792, issued by the Valley National Bank, Phoenix, Arizona, December 12, 1954, payable to the order of Long's Date Gardens in the amount of \$500.

Count IV.

(18 U.S.C.A. 1343)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 14th day of June, 1954, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone Grant-Whitman Company, Spokane, Washington, and place an order for food products, viz., canned salmon, to be delivered to the Acme Distributing Company, Tempe, Arizona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

Count V.

(18 U.S.C.A. 1343)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 22nd day of May, 1954, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone Shurtz Produce Company, Hutchinson, Kansas, and place an order for food products, viz., dressed poultry, to be delivered to the Acme Distributing Company, Tempe, Arizona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

Count VI.

(18 U.S.C.A. 1343)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 10th day of May, 1954, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone Poletti Sausage Company in San Francisco, California, and place an order for food products, viz., sausage, to be delivered to the Acme Distributing Company, Tempe, Arizona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

Count VII.

(18 U.S.C.A. 1343)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 31st day of August, 1953, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone R. O. Kelley Cannery at Midville, Georgia, and place an order for food products, viz., canned peas, to be delivered to the Hoffman Wholesale Grocery, Tucson, Arizona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

Count VIII.

(18 U.S.C.A. 1341)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 24th day of August, 1953, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice, placed or caused to be placed in an authorized depository for mail matter at Tucson, Arizona, to be sent and to be delivered by the Postal Establishment of the United States, a certain writing enclosed in a postpaid envelope addressed to the R. O. Kelley Cannery, P. O. Box 175, Midville, Georgia, to wit, a request for samples, and promising further contact with a view to placing an order for merchandise.

Count IX.  
(18 U.S.C.A. 1341)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 13th day of August, 1953, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the afore-said scheme and artifice, placed or caused to be placed in an authorized depository for mail matter at Tucson, Arizona, to be sent and to be delivered by the Postal Establishment of the United States, a certain writing enclosed in a postpaid envelope addressed to Hayward's Special Products Company, Hohen Solms, Louisiana, to wit, a confirmation of an order for merchandise placed via long distance telephone.

Count X.  
(18 U.S.C.A. 1343)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 13th day of August, 1954, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the afore-said scheme and artifice did, by interstate wire, telephone Hayward's Special Products Company, Hohen Solms, Louisiana, and place an order for food products, viz., fruit preserves, to be delivered to the Hoffman Wholesale Grocery, Tucson. Ari-

zona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

Count XI.

(18 U.S.C.A. 1343)

The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

On or about the 29th day of May, 1953, in the District of Arizona, the defendant, Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone T. L. Brice Company, Sherman, Texas, and place an order for food products, viz., pickles, to be delivered to the Hoffman Wholesale Grocery, Tucson, Arizona, and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.

A True Bill.

/s/ [Indistinguishable],

Foreman.

/s/ JACK D. H. HAYS,

United States Attorney.

[Endorsed]: Filed October 26, 1955.

[Title of District Court and Cause.]

**MOTION TO DISMISS AND  
NOTICE OF MOTION**

**Motion to Dismiss**

The defendant moves to dismiss the indictment and each Count thereof on the ground that each Count is fatally defective in that it does not state facts sufficient to constitute an offense against the United States.

**LOUIS B. WHITNEY,  
LORETTA WHITNEY,  
PAUL W. LA PRADE;**

**By /s/ LOUIS B. WHITNEY,  
Attorneys for Defendant.**

**Notice of Motion**

**To: United States of America, Plaintiff, and Jack  
D. H. Hays, Esq., United States Attorney,  
Plaintiff's Attorney:**

Please Take Notice that upon the indictment herein in the above-entitled and numbered cause, and upon the Points and Authorities herewith served upon you, the undersigned will move this Court on and at the next regular Law and Motion Calendar of this Court, in the United States Court House, Phoenix, Arizona, at 10:00 o'clock a.m., in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order dismissing the indictment and each Count thereof.

Dated November 21st, 1955.

LOUIS B. WHITNEY,  
LORETTA WHITNEY,  
PAUL W. LA PRADE;

By /s/ LOUIS B. WHITNEY,  
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed November 21, 1955.

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[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, NOV. 28, 1955  
Honorable Dave W. Ling, United States District  
Judge, Presiding.

This case is now called for arraignment and for hearing on Motion to Dismiss. The defendant is present in person with his counsel, Louis B. Whitney, Esq. On motion of William A. Holohan, Esq., Assistant United States Attorney,

It Is Ordered that the Government is allowed 5 days to file memorandum in opposition to Motion to Dismiss and that said motion be set for hearing December 5, 1955, at 10:00 o'clock a.m. The defendant is now arraigned. The defendant waives the reading of the indictment and a copy thereof is given to him and he is called upon to plead. The defendant's plea is not guilty, which plea is entered.



It Is Ordered that this case is passed for trial setting and that the defendant is allowed 10 days after ruling on motion to dismiss to move for Bill of Particulars.

---

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY, DEC. 30, 1955

Honorable Dave W. Ling, United States District Judge, Presiding.

It Is Ordered that Defendant's Motion to Dismiss the Indictment and each count thereof is denied.

---

[Title of District Court and Cause.]

### BILL OF PARTICULARS

Comes Now the United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and pursuant to the position taken in its Memorandum in Opposition to defendant's Motion for a Bill of Particulars, provides the following information:

The following tabulation includes the name and address of each person, firm and company included in the phrase persons, firms and companies as used in line 17 and line 20 of the first count of the indictment and the corresponding lines of each count thereafter. Included also are the food and food products ordered by the defendant and the names

of the persons who received the telephonic communications from the defendant.

### Company

Couroy Coffee,  
1328 McGee,  
Kansas City, Missouri

Item: Coffee

Person phoned: Ralph Clark

Hayward's Special Products,  
P. O. Box 2,  
Hohen Solms, Louisiana

Item: Preserves

Person phoned: W. C. Hayward, Sr.

Forest H. Johnson Company,  
711 Second Avenue,  
Seattle, Washington

Item: Canned Sea Food

Person phoned: Edi A. Olund

T. L. Brice Company,  
Sherman, Texas

Item: Pickles

Person phoned: Ted S. Brice

River Rest Farms,  
Shawnee, Oklahoma

Item: Turkeys

Person phoned: Ray Ferguson

Company

Duncan Coffee Company,  
Houston, Texas

Item: Coffee

Persons phoned: Ben Ball and John H.  
Duncan

Stewart's Animal Food Co.,  
2618 Sprague,  
Spokane, Washington

Item: Dog Food

Person phoned: E. G. Stewart

Gavin Bros.,  
Coleman Building,  
Seattle, Washington, and  
Grant-Whitman Company,  
41 East Gray,  
Spokane, Washington

Items: Canned Salmon and Crabmeat

Person phoned: Jack Ehlinger

Long Date Gardens,  
2600 East Foothill,  
Pasadena, California

Item: Dates

Person phoned: Mrs. Lola M. Darling

Shurtz Produce Company,  
Box 135,  
Hutchinson, Kansas

Item: Poultry

Person phoned: H. B. Shurtz

## Company

C. A. Glass Company,  
701 East 7th,  
Los Angeles, California

Item: Dates

Person phoned: John L. Glass

R. O. Kelley Cannery,  
P. O. Box 175,  
Midville, Georgia

Item: Peas

Person phoned: R. O. Kelley

Poletti Sausage Company,  
428 Pacific,  
San Francisco, California

Item: Meat Products (Sausage)

Person phoned: John Poletti

Booth Fisheries,  
309 West Jackson Blvd.,  
Chicago, Illinois

Item: Shrimp

Person phoned: Jack Harding

/s/ JACK D. H. HAYS,  
United States Attorney.

[Endorsed]: Filed February 20, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY, SEPT. 21, 1956

Honorable Dave W. Ling, United States District  
Judge, Presiding.

The Government rests.

At 11:35 o'clock a.m., the jury is admonished and excused until 1:30 o'clock p.m.

At the close of the Government's case, Paul La Prade, Esq., counsel for the defendant, moves for judgment of acquittal on each and every count of the indictment and states his grounds therefor.

It Is Ordered that said Motion for Judgment of Acquittal is denied.

At 11:45 o'clock a.m., It Is Ordered that the further trial of this case is continued to 1:30 o'clock p.m.

Subsequently, at 1:30 o'clock p.m., the jury, the defendant and counsel are all present pursuant to recess and further proceedings of trial are had as follows:

The defendant rests.

The jury is admonished by the court and excluded from the court room.

At the close of all the evidence, Louis B. Whitney, Esq., counsel for the defendant, moves to dismiss the indictment and states his grounds therefor, and it is ordered that said motion to dismiss is denied.

Said counsel for the defendant moves for judgment of acquittal on each and every count of the indictment and states his grounds therefor, and it is ordered that said motion for judgment of acquittal is denied.

---

[Title of District Court and Cause.]

### VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Benjamin B. Hoffman, guilty as charged in count 1; guilty as charged in count 2; guilty as charged in count 3; guilty as charged in count 4; guilty as charged in count 5; guilty as charged in count 7; guilty as charged in count 8; guilty as charged in count 9; guilty as charged in count 10; guilty as charged in count 11.

/s/ JAMES R. CARTER,  
Foreman.

[Endorsed]: Filed September 24, 1956.

---

[Title of District Court and Cause.]

### MOTION IN ARREST OF JUDGMENT

Defendant moves the Court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States,

in particular, the indictment does not allege that the scheme to defraud was a continuing scheme up to and including the dates that the phone calls and letters were alleged to have been placed or mailed.

WHITNEY & LA PRADE;

By /s/ LOUIS B. WHITNEY,  
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 5, 1956.

---

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting testimony of the following witnesses, to which proper objections were duly made:

Lola M. Darling

Mr. Pritchett

T. S. Bryce  
Herman Crede  
Rulan Goodman  
John E. Doyle  
R. O. Kelly  
T. J. Gavin  
Jack Ehlinger  
W. C. Hayward  
H. B. Shurtz  
John L. Glass

WHITNEY & LA PRADE;

By /s/ LOUIS B. WHITNEY,  
Attorneys for Defendant.

### MOTION IN SUPPORT OF MOTION FOR NEW TRIAL

There is no substantial evidence to support the verdict in this case for the reasons that the evidence is lacking that the defendant made the representations charged in each and every count of the indictment (excluding Count VI, which was dismissed), because there was no testimony that the defendant represented that he had a good credit rating and that the goods ordered would be paid for promptly in full, or that the Acme Distributing Company or the Hoffman Wholesale Grocery Company “was an active and responsible business concern.” If the representations were not made as charged in the indictment, then there is no evidence to support the scheme.



As to the mail counts, i.e., Counts I, III, VIII and IX, the representations do not appear in any of the correspondence mailed by Hoffman.

With reference to the other counts concerning the telephone calls, each of those counts is followed by the wording, "and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid." This means to us that on each telephone conversation the defendant must have made the "fraudulent representations and promises as aforesaid," or there is an entire failure of proof. This last quotation on the telephone counts the writer does not remember seeing in any other indictment, i.e., in that part of the indictment stating the gist of the offense.

We respectfully submit that for the reasons given a new trial should be granted, or in the alternative, our motion for judgment of acquittal on the mail counts and on the wire counts should be granted.

Respectfully,

WHITNEY & LA PRADE;

By /s/ LOUIS B. WHITNEY,

Attorneys for Defendant.

[Endorsed]: Filed October 5, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, OCT. 8, 1956

Honorable Dave W. Ling, United States District Judge, Presiding.

This case comes on regularly for sentence this day. William Eubank, Esq., Assistant United States Attorney, is present for the Government. The defendant is present in person with his counsel, Louis B. Whitney, Esq., and submits Motion in Arrest of Judgment, and

It Is Ordered that Motion in Arrest of Judgment is denied.

Defendant's Motion for New Trial is argued by counsel.

It Is Ordered that said Motion for New Trial is denied.

The defendant is now afforded an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. Thereupon, the court finds that no legal cause appears why judgment should not now be imposed and renders judgment as follows:

In the United States District Court  
for the District of Arizona

No. C-13,999—Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BENJAMIN B. HOFFMAN,

Defendant.

### JUDGMENT AND COMMITMENT

On this 8th day of October, 1956, at Phoenix, Arizona, came the attorney for the Government, and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 18, Section 1341, United States Code (using mails to promote fraud), as charged in Counts 3, 8 and 9 of the indictment, and Title 18, Section 1343, United States Code (fraud by interstate wire), as charged in Counts 1, 2, 4, 5, 7, 10 and 11 of the indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of five (5) years on each of said Counts 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11, these sentences to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,  
United States District Judge.

[Endorsed]: Filed and docketed October 8, 1956.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of appellant: Benjamin B. Hoffman, Phoenix, Arizona.

Names and address of appellant's attorneys: Louis B. Whitney and Paul W. La Prade, 810 Luhrs Tower, Phoenix, Arizona.

Offense: Mail fraud; fraud by interstate wire—violation of 18 U.S.C.A. 1341 and 1343.

Concise statement of judgment or order, giving date, and any sentence: Five (5) years on each of ten (10) counts to run concurrently; date of sentence, October 8, 1956.

Name of institution where now confined, if not on bail: In custody of the Attorney General of the United States; do not know name of institution.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment dated October 8, 1956.

Dated: October 18, 1956.

/s/ LOUIS B. WHITNEY,  
Attorney for Appellant;

/s/ PAUL W. LA PRADE,  
Attorney for Appellant.

[Endorsed]: Filed October 18, 1956.

---

In the United States District Court  
for the District of Arizona

No. C-13,999

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

BENJAMIN B. HOFFMAN,  
Defendant.

Present:

JACK D. H. HAYS,  
U. S. District Attorney, by  
WILLIAM E. EUBANK,  
Appeared on Behalf of the Plaintiff.

LOUIS B. WHITNEY and  
PAUL W. LA PRADE  
Appeared on Behalf of Defendant.

## Proceedings

September 18, 1956—10 A.M.

The Clerk: Case Number C-13,999, United States of America, Plaintiff, versus Benjamin B. Hoffman, Defendant, for trial.

Mr. Eubank: Plaintiff is ready, your Honor.

Mr. Whitney: Defendant is ready.

The Court: Call the names of 28 jurors. As your names are called, come forward, please.

(Thereupon the Jury was duly impaneled and sworn to try the issues of the case.)

Mr. Whitney: If your Honor please, I would like to have the witnesses put under the Rule.

Mr. Eubank: Your Honor, some of our witnesses are not to arrive until tomorrow morning.

The Court: All right, you will watch to see that your witnesses remain out of the courtroom. Call up now whoever is present.

(Witnesses present were sworn and excluded from courtroom.)

The Court: All witnesses will be required to remain out of the courtroom during the course of the trial.

Mr. Eubank: Your Honor, I request that Mr. Tyer, postal inspector, be allowed to remain.

The Court: All right.

Mr. Eubank: And also Mr. Lyn Bedford of the F.B.I.

The Court: All right. [2\*]

Do you want to make an opening statement?

Mr. Eubank: Yes.

The Court: You may proceed.

Mr. Eubank: May it please the Court, Ladies and Gentlemen of the Jury:

Probably the one thing Mr. Whitney and I will agree upon today is that this case will not be proved in the newspapers, but in this room. It is our duty to prove it beyond a reasonable doubt. If we don't prove it that way, he should not be convicted.

We have in the Indictment eleven counts against Mr. Ben B. Hoffman. He is charged with a violation of two laws, a synthesis of which I would like to read now, just to solidify the two points we are going after here. Both of these laws are under the general section called Mail Fraud.

The first one is Title 18 of the United States Code, Section 1341, and it is entitled also Frauds and Swindles.

“Whoever, having devised \* \* \* any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises \* \* \* for the purpose of executing such scheme or artifice or attempting so to do, placed in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office [3] Department \* \* \* shall be fined \* \* \*”

And then the penalty. That is 1341, dealing with placing anything in the mails having to do with the

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

furtherance of this scheme or artifice to defraud.

Now, Title 18, United States Code, 1343, is also under this general category, Mail Fraud, and it is entitled Fraud by Wire, Radio, or Television. It has to do with interstate wire. Generally, it reads as follows:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio or television communication \* \* \* for the purpose of executing such scheme or artifice, shall be fined \* \* \*”

There are two main elements we are going to have to prove probably today and tomorrow, and one of those elements is the fact that the mails and the telephone were used to further this scheme to defraud. The other element would be that there was a scheme in Mr. Ben B. Hoffman's own mind, because if there was no scheme, obviously, he can't be guilty of this thing.

The scheme is subjective. We can't take out his brain and hold it up, so we are going to prove that he was [4] guilty of contemplating this scheme by circumstantial evidence.

We intend to show that Ben B. Hoffman maintained two front companies at three locations. He maintained a front company at Tempe, and one at Mesa. He maintained a front company at Tucson.

The name of the front companies at Tempe and Mesa was The Acme Distributing Company. The



front company at Tucson was Ben B. Hoffman Wholesale Grocers.

We will produce witnesses to show that these offices had a few pieces of furniture in them, but were not the vigorous type of office that you would expect a person dealing in this type of high finance, a person dealing with wholesale grocers all around the United States.

We will show that by the use of the mails, and mainly by the use of telephone communication, and quite often collect telephone communication, that Mr. Hoffman would approach these people, never personally, but always long distance, collect telephone, or by letter. That when he would make this contact, that he knew a great deal about the particular business that these people were in, that because of his knowledge and the fact that he knew other people in the field, that they extended credit in the usual terms of business. That no payments were made in the great amount of instances. There were several payments made of very small amounts on total bills. [5]

We expect to use that to prove that these were lulling attempts, and by lulling attempts we mean where a bill has accumulated, and no further merchandise will be shipped unless payment has been made that a small amount of money was paid on the bill, so that further shipments would be made, and that the shipments that did follow what we call the lulling attempt were actually much greater in value than the amount of money that was paid on the account.

Now, we will attempt to prove, or we will prove that these shipments were made into the Phoenix area, and that they were picked up usually by Mr. Hoffman, that in several instances they were sold within a few days after the shipment was received, and that when that shipment was sold that the shipment was sold for a lesser amount than the amount of the invoice and the amount that our people contracted with him.

In other words, we will show that he took this merchandise when he got it in his possession, and almost immediately took it out and disposed of it for prices less than it would have cost him if he were on the level as a business man.

The problem of a case like this is that we have to resurrect this stage play. We are going to parade many actors over that witness stand. They are the only means, they, testifying directly to their sensory impressions are the only [6] means that we have to recreate the scenes and the incidents that happened.

Consequently, in a case of this type there is an element of disorganization, for the very reason that there are so many small pieces of circumstantial evidence to come in.

I think you will find it interesting, though, to attempt in your own mind, with the preliminary remarks I have made here this morning, to attempt to see where these cogs fit in. When I have completely presented my case, and the defendant has completely presented his case, we will give you closing argument, at which time I will attempt to draw this multitude of testimony together, so that

it shall actually paint for you a full picture, just like a puzzle, and all these pieces supposedly will be in place.

Thank you.

The Court: Do you want to make a statement at this time?

Mr. Whitney: Yes, your Honor.

The Court: All right.

Mr. Whitney: If the Court pleases, Ladies and Gentlemen of the Jury:

The United States attorney made a statement as to what he intends to prove, at least what he says he is going to attempt to prove.

He did not read the part of the Indictment [7] setting forth the so-called scheme to defraud.

Count I of the Indictment sets forth the alleged scheme. That is carried forward in each of the other ten counts to this indictment, some of which are based on alleged telephone conversations, and some of which are based upon alleged use of the mails, with the purpose of executing the fraud, the fraud charged here.

The Indictment, in Count I, insofar as the alleged scheme is concerned, says:

“On or about the 29th day of May, 1953, Benjamin B. Hoffman, hereinafter called the defendant, devised a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises; that the scheme so devised was substantially as follows: The defendant used the names of two companies, the Hoffman Wholesale Grocery and the Acme Distributing Company,

to place orders outside the State and District of Arizona, on open account with various persons, firms and companies, dealing in food and food products, and in placing the said orders the defendant represented that the Hoffman Wholesale Grocery or the Acme Distributing Company was an active and responsible business concern, within the State of Arizona, with good credit rating and that the goods ordered would be paid for promptly in full; that the aforesaid representations [8] and promises were made to induce the persons, firms, and companies receiving them to ship their merchandise to the defendant on credit; that the defendant well knew at the time the aforesaid representations and promises were made that the Hoffman Wholesale Grocery and the Acme Distributing Company were, in fact, not active and responsible business concerns in the State of Arizona, and not possessed of a good credit rating, but in truth and in fact said companies were dummy business organizations with only nominal assets and created by the defendant to accomplish his scheme; and that the defendant further knew that the goods ordered and shipped to the Hoffman Wholesale Grocery and the Acme Distributing Company would not be paid for promptly in full, and the defendant did not intend to pay for said food and food products received, except to make token payments to induce the sellers thereof to further rely on the false representations and promises previously made;”——

Now, as I understand, on that score Mr. Eubank

said he was going to attempt to prove that they made these token payments to lull these people into selling them other merchandise, which they did. I want you to be very careful to see that that happened.

“—that as a further part of said scheme, the defendant converted said food and food products immediately into [9] cash by selling the same, keeping the proceeds for his own use and benefit.”

Then states what is known as the gist of the offense, which is the telephone conversation, or the mailing of the letters, as the case may be.

This crime is divided into two parts. One without the other is not sufficient. In the first instance, they must prove the scheme to defraud substantially as laid in the indictment. If they prove that scheme and they do not prove anything else, no crime has been committed.

But they have got to further prove that in furtherance of said scheme that he either mailed the letter charged in the indictment, or made the telephone call as charged in the indictment. If they fail to prove the scheme and they prove the other part without the scheme, the court will probably instruct you no crime was committed.

In other words, there are two elements to this, the scheme to defraud, and the mailing of the letter and the telephone call. This is what the lawyers call the gist of the offense, that is, the offense itself, after you have proved the scheme, is the telephoning; the scheme itself is the telephoning, but there must be a scheme upon which they base the main

telephone conversation, and we ask that you watch the testimony carefully to see that it is proven as laid down in the indictment, and as stated by Mr. Eubank. [10]

Thank you.

The Court: We will have our morning recess at this time. During the recess, you are not to discuss the case among yourselves, nor permit anyone to discuss it with you. You will also avoid forming or expressing any opinion upon any subject connected with it.

The court will stand at recess for ten minutes.

(A short recess was had.)

The Court: Call your first witness.

Mr. Eubank: I call Mrs. Lola M. Long.

### LOLA M. LONG DARLING

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Mrs. Lola M. Long?

A. That is my business name. My married name is Darling now.

Mr. Whitney: At this time, for the purpose of the record, defendant objects to any evidence being introduced under the Indictment in this case, mainly upon the ground that the Indictment states the scheme was devised on the 29th of May, 1953. It doesn't state that it continues to the filing of the

(Testimony of Lola M. Long Darling.)

indictment, or to any date whatsoever. For that reason, [11] I think it fails to state a public offense.

The Court: Very well. Objection overruled. Go ahead.

Q. (By Mr. Eubank): Your real name, or your present real name is Lola M. Darling?

A. Yes.

Q. And your business name is Lola M. Long?

A. Yes.

Q. You are the owner and operator of Long's Date Gardens?

A. Yes.

Q. That is located in Pasadena, California?

A. Yes.

Q. How long have you been in that business, Mrs. Darling?

A. About ten years.

Q. Could you tell the Jury why you also use the name of L. M. Long?

A. That was my married name until I married in April of 1954, so I just carried on Long as my business name.

Q. I want to take you back to a telephone call——

Do you recall the name of Acme Distributing Company of Tempe?

A. As making the call?

Q. No, do you recall the name?

A. Yes.

Q. How do you recall that name? [12]

A. Well, through the envelope that they sent me with the check in.

Mr. Whitney: Pardon me, I didn't get that answer.

(Testimony of Lola M. Long Darling.)

The Witness: By the name of the—from the envelope with the check that they sent me.

Q. (By Mr. Eubank): What was the check sent to you for, or in relation to what?

Mr. Whitney: If the Court please, I object. It isn't the best evidence. No foundation laid for that.

The Court: All right. That is true.

Q. (By Mr. Eubank): Prior to receiving an envelope with the name of Acme Distributing Company, had you had any dealings with Acme Distributing Company before that time? A. No.

Q. If I understand your testimony correctly, you received a letter before you ever received any telephone call?

A. No, the telephone call was the first.

Q. In relation to a telephone call, can you establish the date, or approximate date on which you received a telephone call?

A. I would say it would be three or four days before the shipment that was sent to Acme Distributing Company, which was about November 24th, I believe. [13]

Q. Do you have any records, or are there any records, business records that would help you identify the exact date?

A. Well, the bills of lading and the invoices that I kept.

Q. All right. In relation to the first telephone call, would you please describe that to the jury?

Mr. Whitney: If the Court please, I object to



(Testimony of Lola M. Long Darling.)

that on the grounds no foundation has been laid for that. They have got to identify the caller.

The Court: They can't do it all at once, Mr. Whitney. Go ahead.

Mr. Whitney: I realize that, but they made——

The Court: All right. Objection overruled. You made your objection.

Q. (By Mr. Eubank): The first telephone call, would you please tell the name of the person, or the way they identified themselves?

A. They identified themselves as Acme Distributing Company of 818 Apache, either boulevard or street, in Tempe, Arizona.

Mr. Eubank: At this time I would like to have this marked for identification.

The Clerk: Government's Exhibit 1 for identification.

(Said Telephone toll bill was marked as Government's Exhibit 1 for identification.) [14]

Q. (By Mr. Eubank): I show you Government's Exhibit 1 for identification and ask you if you recognize that document?      A. Yes.

Q. What is the document?

A. It is the toll charges for the telephone bills.

Q. How do you recognize it?

A. From my check mark and my writing.

Q. Is this your writing?      A. Yes.

Mr. Eubank: At this time I would like to offer Government's Exhibit 1 for identification in evidence.

(Testimony of Lola M. Long Darling.)

Mr. Whitney: If the Court please, we object to this on the grounds no proper foundation being laid for admission. It is purely hearsay and not the best evidence.

The Court: It may be received.

(Said Telephone toll bill was received in evidence and marked as Government's Exhibit 1.)

Q. (By Mr. Eubank): I show you Government's Exhibit 1 in evidence and ask you if you can describe, or approximate from this statement the date of the first phone call?

A. Well, it must have been about four days before that.

Q. How can you approximate or identify the approximate time? I mean, by looking at that bill? [15]

A. Well, it would take that long to get the merchandise out that he ordered.

Q. Would you describe this first call? Was it a straight telephone call, or was it a Collect call?

A. No, the first was just he called.

Q. It was a straight call? A. Yes.

Q. Then was there another call?

A. Yes. Then he called.

Q. How did he call that time?

A. Well, that Collect call.

Q. A Collect call? A. Yes.

Q. And approximately how many days before the Collect call did he make the first call?

(Testimony of Lola M. Long Darling.)

A. I would say it would have to be at least three or four days.

Q. Now, I show you Government's Exhibit 1 and ask you by looking at this document how you identify the approximate date of the first call? In other words, something on this sheet must indicate to you that you received a call that was Collect?

A. It must have been around the 20th of November.

Q. How did you come at that approximate date?

A. Well, if we sent the fruit the 24th, it would probably [16] at least take that much time to get it ready and out. And this call, if I remember correctly, was wanting to know when the fruit would be sent.

Q. As far as you recall, is this the second call from him?

A. I would say it is. The first one was not Collect.

Q. Now, this particular document, how did you receive it?

A. It come with this telephone bill.

Q. And in your business, Mrs. Long, records of this type, how do you keep them?

A. Well, they are just entered as the cost, you know, whatever the toll telephone bill is, as far as records, except keeping those little individual slips from where the calls are made from.

Q. In your business, do you preserve this type of information?      A. Yes.

Q. And this one is from your records?

(Testimony of Lola M. Long Darling.)

A. Yes.

Q. Now, you have testified that approximately three or four days before this Collect call—by the way, would you read this Collect call off to the jury so that they will know when the Collect call was?

A. The Collect call was made November 26th.

Q. From where? [17] A. Tempe.

Q. How much was the charge to you?

A. \$1.10.

Q. Now, back to the first telephone call that was approximately four days before this one. What was the voice of the caller? Was it a male, or female, or child? A. I would say it was a male.

Q. Do you recall generally the conversation, or the questions asked you by this voice?

Mr. Whitney: Just yes or no on that.

Q. (By Mr. Eubank): Do you recall the conversation? A. Yes, I recall it.

Q. What did the person ask?

Mr. Whitney: If the Court please, I object to it on the grounds that no foundation has been laid for it. This is a different situation than if a man has an established phone.

The Court: If they don't prove their case I will direct a verdict.

Mr. Whitney: Thank you.

The Court: So don't interrupt just the minute a question is asked.

Q. (By Mr. Eubank): What did this individual say that called you? [18]

A. The party that called, that identified me as

(Testimony of Lola M. Long Darling.)

Mrs. Long, they asked me if I had any dates to sell, of which I told him I did. And then they told me the amount they would want, and we agreed on a price, just by telephone only.

Q. Do you recall the amount that they wanted, approximately?

A. I think the first order he wanted 600 boxes of three and five-pound sizes.

Q. And what was the price you quoted him?

A. I quoted 45 cents a pound F.O.B. Pasadena.

Q. What were the terms for the payment?

A. Well, it was just my understanding that ten days or net thirty, the way all of our other bills are paid.

Q. Did you discuss that over the telephone?

A. Not that I recall, but just from the talk on the telephone, and everything, I just took it for granted that——

Q. Did he seem to know—well, state whether or not he appeared to you to know about this type of business?

A. Well, it sounded to me like he did.

Q. Is it the usual course, or is it your usual course to grant credit to persons that call over the telephone in that manner?

A. We have, yes, but not on such a large scale I didn't before.

Q. What was the factor that in this case caused you to grant credit of this amount? [19]

A. Well, it was just his conversation, I would say.

(Testimony of Lola M. Long Darling.)

Q. What element of that conversation?

A. It seemed like he had evidently known of the company, it sounded to me like, for a period of time.

Q. Did he seem to know someone in your family?

A. I don't know. He just said "Mrs. Long," mostly.

Mr. Whitney: I object. This is a little leading.

The Court: Yes, it is.

Q. (By Mr. Eubank): Can you establish the date from your office records that you made the various shipments to the Acme Distributing Company?

A. Yes, I have the bills of lading that was marked by the Watson Trucking Company when they picked them up from our dock.

Q. In the course of your business, will you tell us these records that you keep and how you keep them? For example, now, let us take the bill of lading. Who fixes those up, who writes them up?

A. Well, I usually took care of them, but if there was an emergency, the boy I had working for me helped me out.

Q. How many copies of the bill of lading are there?

A. Oh, there must be about ten, I would say.

Q. And how many copies do you keep for your records?

A. I send them the original invoice and number three [20] copy of the bill of lading.

Q. How many do you keep for your records?

A. I just keep one.

Q. You keep one?

(Testimony of Lola M. Long Darling.)

A. Of the bill of lading.

Mr. Eubank: I would like these bills of lading marked as Exhibit 2, and each of the pages as 2A, B, C, etc.

The Clerk: Government's Exhibit No. 2, and 2-A to 2-M, inclusive, for identification.

(Said Bills of Lading marked as Government's Exhibits 2, and 2-A to 2-M, inclusive, for identification.)

Q. (By Mr. Eubank): I show you Plaintiff's Exhibit 2, 2-A through 2-M, for identification, and ask you to look at each one of these, and ask you if you have seen those before? A. Yes.

Q. How do you recognize that?

A. This appears to be the signature of the fellow that worked for me, and then the others are my signature.

Q. And are these made at or about the time of the shipment?

A. The day the shipment went out.

Mr. Eubank: I ask that these bills of lading be admitted in evidence.

Mr. Whitney: As one exhibit? [21]

Mr. Eubank: Actually as part of two, all being the bills of lading.

Mr. Whitney: I object to it as immaterial and not binding on the defendant.

The Court: It may be received.

The Clerk: Government's Exhibit 2 and 2-A to 2-M, inclusive, in evidence.

(Testimony of Lola M. Long Darling.)

(Said documents were received in evidence and marked as Government's Exhibits 2, 2-A to 2-M, inclusive.)

Q. (By Mr. Eubank): I show you Plaintiff's Exhibit in evidence 2, 2-A through 2-M, inclusive, and ask you what these documents represent?

A. Well, it is for the amount of merchandise that was sent each day.

Q. Sent to whom?

A. Acme Distributing Company.

Q. And do these bills of lading here include all of the shipments that you made to Acme Distributing Company?

A. Yes.

Q. Now, do the amounts written on these bills of lading include the amount of dates that you shipped?

A. Yes.

Q. All of them are covered by the bill of lading, are they? [22]

A. Yes.

Q. Now, you have testified that your business is in Pasadena, California. Where were these goods shipped from and to where?

A. Well, they was shipped by Watson Trucking Brothers, which they specified me to ship by, from our loading dock in Pasadena, to Tempe, Arizona.

Q. All right. Now, in regards to the first telephone call, now, the original telephone call, was there any specification by the Acme Distributing Company over the lines to ship, shippers to use?

A. Yes, they definitely stated Watson Brothers.

Q. And is that the reason that all of those bills



(Testimony of Lola M. Long Darling.)

of lading are so marked, signed? A. Yes.

Q. With regard to the telephone bill here, this is Government's Exhibit 1, was this bill paid by you?

A. Yes.

Q. And what particular phone was this charge charged to?

Mr. Whitney: I object to it as immaterial.

The Court: I don't see what difference it makes. She paid it.

Mr. Eubank: We intend, your Honor, to connect up the venue problem by several of these types of things.

The Court: I don't understand what you mean, the [23] venue problem.

Mr. Eubank: One of our elements, of course, is to prove the venue in the state of Arizona, of the scheme.

The Court: The call was to California, she testified. It was interstate. I don't know what else you need.

Mr. Eubank: I will ask that this be marked as Government's Exhibit No. 3, and also that each of the items be marked 3-A and 3-B.

The Clerk: Government's Exhibits 3, 3-A and 3-B for identification.

(Said Invoices were marked as Government's Exhibits 3, 3-A and 3-B for identification, respectively.)

Q. (By Mr. Eubank): I show you Govern-

(Testimony of Lola M. Long Darling.)

ment's Exhibits 3, 3-A and 3-B for identification, and ask you if you recognize those documents?

A. Yes.

Q. What are these documents?

A. Well, this is the invoices, see. I sent each one individual. This is for——

Mr. Whitney: No.

Mr. Eubank: Just what the documents are.

The Witness: It is the invoices for the amount of fruit that we sent them.

Q. (By Mr. Eubank): These invoices, when are they arrived at, as far as [24] your company is concerned? When did you make these up?

A. I tried to make them each day for that, but at the end of the week, so I could send them out the bills, see. But when they weren't paid, then I sent it for the whole month.

Q. When these invoices are made, where are they filed in your company?

A. Well, under my Unpaid Accounts Receivable.

Q. What kind of a file do you have for that? Is that under the name of the individual or company?

A. Under the individual name, Acme.

Q. And these are under what name?

A. Acme Distributing.

Mr. Whitney: You offer them?

Mr. Eubank: If you would like to look at them. And then I offer them in evidence.

Mr. Whitney: You offer them now?

Mr. Eubank: Yes.

(Testimony of Lola M. Long Darling.)

Mr. Whitney: May I ask the lady a question on voir dire, your Honor?

The Court: All right.

Q. (By Mr. Whitney): Miss Witness, these apparently are copies of some documents, are they not?

A. That is right.

Q. What? [25] A. That is right.

Q. And you keep books of account in your business? A. Yes.

Q. You have a bookkeeper? A. Yes.

Q. And who made these out? The bookkeeper?

A. No, I made those myself.

Q. And you made them out from what? The books?

A. From the bill of lading and the invoice. That is the total for the three, you know, for the month of November, when the bill was not paid.

Q. Some might have been made out from the invoices?

A. They were taken from the original invoices on that sheet.

Q. But they are reflected in your books of account, are they?

A. These, yes. I have all those.

Mr. Whitney: I object to them as being hearsay against the defendant. No foundation is laid. The books are not produced. The books are the best evidence.

The Court: Were the documents kept in the regular order of your business?

The Witness: Yes.

(Testimony of Lola M. Long Darling.)

The Court: Was it the regular order of business to keep such records? [26]

The Witness: I don't understand.

The Court: That was your practice, to keep such records?

The Witness: Yes.

The Court: All right, they may be received.

(Said invoices were received in evidence and marked as Government's Exhibits 3, 3-A and 3-B, respectively.)

Q. (By Mr. Eubank): I show you Government's Exhibits 3, 3-A and 3-B in evidence, and now ask you what these documents contain? What are the amounts specified on them?

A. You mean the totals?

Q. What do they represent?

A. Well, for the amount of cartons of dates that were shipped to Acme Distributing, the number of boxes, and how many to a box.

Q. Now, the originals of these invoices were sent to whom?

A. The original, Acme should have had.

Q. Now, would you please total the amounts for these? Do each of these dates represent a shipment?

A. That is right.

Q. And these totals here represent a grand total for those shipments that you have listed?

A. That is right. [27]

Q. Can you tell the jury the amount of dates that you have shipped, represented by each of those

(Testimony of Lola M. Long Darling.)

three documents?           A. In dollars or pounds?

Q. In dollars.

A. Well, the total was \$17,225.00.

Q. All right, now, what was that based on. That figure is based upon how much a pound?

A. At the rate of 45 cents a pound, which was agreed by telephone by Acme.

Q. Now, did you receive any payment on this bill?           A. Yes; I got one \$500 check.

Mr. Eubank: May this be marked Government's Exhibit 4 for identification?

(Said envelope was marked as Government's Exhibit 4 for identification?)

Q. (By Mr. Eubank): I show you Government's Exhibit 4 for identification and ask you if you recognize this envelope?

A. Yes; that is definitely the one that was sent to me.

Mr. Whitney: You offer this in evidence?

Mr. Eubank: Yes; I will.

Mr. Whitney: If the court please, it is incomplete. It is just an envelope. Until they lay the proper foundation or get the rest of this, we object.

The Court: I don't know anything about it. I haven't [28] the least notion what it is about. She identified this?

Mr. Eubank: She has identified it.

The Court: All right. I don't know what the purpose of it is.

(Testimony of Lola M. Long Darling.)

Mr. Eubank: This envelope——

The Court: Is that the one the check was sent in?

Mr. Eubank: Yes, your Honor.

The Court: All right, it may be received.

(Said envelope was received in evidence and marked as Government's Exhibit 4.)

Q. (By Mr. Eubank): Mrs. Darling, I show you Government's Exhibit 4 and ask you to describe the envelope, namely, the place it was sent from?

The Court: That speaks for itself.

The Witness: It has Acme Distributing——

The Court: Don't waste time with that. The exhibit speaks for itself.

Mr. Eubank: All right.

The Court: The jury can read that.

Mr. Eubank: Your Honor, at this time I have a request to make. We have the original check subpoenaed from the Valley National Bank, the original cashier's check. I would like to at this time withdraw Mrs. Long, with the Court's consent. [29]

The Court: Put on the witness from the bank and have her stand aside for a minute. Is that what you want?

Mr. Eubank: Yes.

The Court: All right, it may be done. Stand aside, please. Where is your witness from the bank?

Mr. Eubank: Mrs. Alta Foster.

ALTA FOSTER

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Will you state your name, please?

A. Mrs. Alta Foster.

Q. And you are the assistant manager of the  
Valley National Bank, Willetta and First Street  
office?

A. That is right.

Q. And that is here in Phoenix, Arizona?

A. That is right.

Q. And you are here under a subpoena duces  
tecum in which you were asked to bring a certain  
cashier's check No. 27792 with you?

A. That is right, sir.

Q. Do you have that check with you?

A. I do. [30]

Q. Would you please explain to the Jury the  
Valley National Bank procedure in handling cash-  
ier's checks when they are sold, and when they are  
returned through the ordinary course of business?

A. Yes, sir. When a cashier's check is bought,  
we pay to the order of——

Mr. Whitney: Wait a minute. What is in the  
check?

The Witness: I am sorry, Mr. Whitney.

Mr. Whitney: I object to stating what is in the  
check, it speaks for itself.

The Court: She wasn't testifying what was in  
the check. Go ahead on the procedure when one is

(Testimony of Alta Foster.)

purchased.

The Witness (Continued): The name of who the check is bought for is in the Pay to the Order of, and up in the corner we have "For," and that is the name of the purchaser or person buying it, or what they are paying for. When the check is brought back to the bank it is cancelled as Paid, and filed numerically in our files, and they are kept forever.

Mr. Eubank: I would like this check to be marked as Plaintiff's Exhibit 5.

The Clerk: Government's Exhibit 5 for identification.

(Said Cashier's Check was marked as Government's Exhibit 5 for identification.)

Q. (By Mr. Eubank): Now, I show you Plaintiff's Exhibit 5 for [31] identification and ask you if you recognize that check? A. Yes, I do.

Q. Is that the one you brought with you this morning? A. That is right.

Q. Is that one that was kept in the regular course of your bank's business?

A. That is right.

Mr. Whitney: Are you offering that now?

Mr. Eubank: Yes.

Mr. Whitney: I don't think there is any foundation laid.

The Court: I agree. You had better recall your other witness.

Mr. Eubank: Your Honor, we have a photostatic



(Testimony of Alta Foster.)

copy of this check, and the bank wants the original.

The Court: All right, if it is received in evidence I will let you withdraw it.

Mr. Eubank: All right, sir.

The Court: It hasn't been received yet.

Mr. Eubank: Would you step down?

The Court: Are you going to recall the witness?

Mr. Whitney: We have no objection to substitution.

Mr. Eubank: All right, but she will want to take this check with her.

The Court: Oh, she wants to take it back? [32]

Mr. Eubank: Yes.

The Court: Sit down there and we will see you get it back.

(Witness excused.)

### LOLA LONG DARLING

resumed the stand and testified as follows:

#### Direct Examination

(Continued)

By Mr. Eubank:

Q Mrs. Darling, I show you Government's Exhibit 5 for identification, and ask you if you recognize this check? A. Yes, that is the one.

Q. And is this the check that you received in the envelope that you identified a few moments ago?

(Testimony of Lola Long Darling.)

A. That is right, that's all that was in it.

Q. Did you inscribe anything upon the check any place?

A. Not that I recall, only just the stamp on the back.

Q. Just this?           A. Yes.

Q. Is this your company's stamp?

A. That is right.

Mr. Eubank: The photostatic copy, your Honor, doesn't have the stamp of the Pay to the Order of Long Dates.

The Court: Well, you better have one made.

Mr. Eubank: And can the back part be put in evidence at that time? [33]

The Court: I don't know what you mean. It bears Mrs. Long's endorsement, or at least the endorsement of the company, doesn't it?

Mr. Eubank: That is right.

The Court: Your photostat doesn't show that?

Mr. Eubank: That is right.

The Court: Well, you have the one that does. Have another photostat made of the back of that check and then you will be all right. You have the front of it in your hand now?

Mr. Eubank: That is right. Can we have that done conditionally, I mean, if we put this in evidence now?

The Court: Introduce your original. When you supply a photostat the original can be returned to the Valley National Bank, whether it is today, to-

(Testimony of Lola Long Darling.)

morrow, next week, or next month. What difference does it make?

Mr. Eubank: Can we have permission, then, to have the Government's Exhibit 5 photostated?

The Court: Yes, sir.

Mr. Eubank: Is this in evidence now?

The Court: Yes.

The Clerk: Government's Exhibit 5 in evidence.

(Said Cashier's Check was received in evidence and marked as Government's Exhibit 5.)

Q. (By Mr. Eubank): In regard to Government's Exhibit 5, the \$500 check, [34] what particular shipment did that relate to?

A. They didn't state any. It was just on an account.

Q. Now, back with your first phone call, did you discuss any \$500 payment with Acme Distributing?

A. No.

Q. How many phone calls followed the first two we have discussed here before, if any?

A. I think there were four all together, collect, from Phoenix, though they called some that weren't collect, but I couldn't tell you.

Q. Are some of those other Collect calls on this bill that you identified earlier?

A. I would say they were all from there, because I didn't hear from anyone else.

Q. I show you Government's Exhibit 1. Can you identify any other calls that might have been from Acme Distributing Company?

(Testimony of Lola Long Darling.)

A. Well, that Tempe.

Q. The Tempe call on what date?

A. It was the 26th of November.

Q. And you have testified that that was the second call, right?

A. To my knowledge, it was the second call.

Q. Okay, what other calls are listed on there that came from Acme Distributing Company? [35]

A. There is one here for the 23rd of November from Phoenix, Collect.

Q. And is that one from Acme Distributing Company?

A. Well, to my knowledge, they were the only ones that called me.

Q. All right, are there any other calls?

A. And then there is one here from—November 27th, from Phoenix, and one the 29th.

Q. And those calls, also, are they from Acme Distributing? A. I would say they were.

Q. Now, these phone calls, Mrs. Darling, were the voices the same voice?

A. I would say all of them except the last call was the same voice.

Q. Is the last call we are talking about the same last call as the collect, the last collect call there?

A. Well, I couldn't say.

Q. You couldn't say? A. No.

Q. But there was a difference in voice on the last call that you had?

A. On the last call, yes, I would say it was a different voice on the last call.

(Testimony of Lola Long Darling.)

Q. Did each one of these calls identify themselves, and if so, how? [36]

A. All of them were Acme except the last call I had.

Q. And as far as a name was concerned, was any name mentioned?

A. No, not on the first calls, except the last, there was a name mentioned.

Q. On the calls from Acme, what was the general character of the call?

A. Well, they would call and ask—tell me the amount of fruit they wanted sent, and when it could be sent.

Q. And did you at any time discuss the collection of the accounts due from them?

A. Well, toward the end of the second week when I didn't get any money, then I told them if they didn't send the money I wouldn't make another shipment.

Q. And what did they say to that?

A. They informed me it would be in the mail it was either a Monday or Tuesday, I think.

Q. And when did you receive the letter?

A. The day they said it would be there. It was either a Monday or Tuesday.

Q. The letter arrived?

A. Yes. And then a shipment was made the next day again.

Q. Could you look at your records and tell how large a shipment was sent the day after you received the check?

(Testimony of Lola Long Darling.)

A. Yes, if you have that. [37]

Q. Here it is.

A. Their check was received on the 12th, and on the 13th I sent 90 cases of one-pound cartons.

Q. How much did that amount to?

A. \$1012.50

Q. And did you make any shipments after that?

A. No.

Q. Now, this last phone call that you have testified to that the voice didn't sound like the previous ones. Would you please describe that for the benefit of the jury? First, how did he describe himself, and what was he interested in?

A. Well, the call came to Long's Date Gardens, and I answered the phone, and he wanted to know if we had any cheap dates, and I said No, I didn't have anything. And he identified himself as Hoffman on the telephone call. And I said that I didn't have the cheap dates.

I said I was sending all I had, you know, to this Acme Distributing in Tempe. And he said, well, that was funny, he was getting a load into Phoenix every day for that price, for 10 cents a pound, I think was the price he quoted me as wanting to buy them for.

Q. Now, what did you do after receiving this telephone call?

A. After I received that and added two and two up, I didn't ship any more dates. [38]

Q. Up until you received that call, had you had any reason to suspect Acme Distributing Company?

A. No, I didn't until toward the second, the end

(Testimony of Lola Long Darling.)

of the second week when they didn't make any payments. Then I began to wonder about what was going on, you know.

Q. Now, when you received this last telephone call, did you take any steps to protect yourself and your business?

A. Yes, we came down to Phoenix.

Q. I beg your pardon?

A. We came down here to Phoenix.

Q. And how long after that last call did you come to Phoenix?

A. I believe it was the 15th of December.

Q. And did you attempt to locate Acme Distributing Company?

A. Yes, we did.

Q. And were you successful in finding it?

A. We found an empty building, was all.

Q. Where was this empty building at?

A. 818 Apache Boulevard in Tempe.

Q. Did you go up to the building and look into it?

A. Yes, we did.

Q. What did you see in there?

A. Just an office desk and a chair.

Q. Was there any sign on the window? [39]

A. Yes.

Q. And what was the sign?

A. It said Acme Distributing.

Q. On looking through the window, what was the furniture in the office?

Mr. Whitney: If the Court please, I think that is immaterial.

The Witness: Just a desk and chair.

(Testimony of Lola Long Darling.)

The Court: She may answer.

Q. (By Mr. Eubank): What was that?

A. Just a desk and chair is all, I would say.

Q. Was there any file, to your knowledge?

A. No.

Q. Did it look like a worked-in office?

A. No.

Q. Was there a telephone in there that you remember? A. I don't remember that.

Q. Mrs. Long, I would like you to identify another item for us.

Mr. Eubank: This will be Exhibit 6, I believe, for identification.

The Clerk: Government's Exhibit 6 for identification.

(Said Package of Dates was marked as Government's Exhibit 6 for identification.) [40]

Q. (By Mr. Eubank): I show you Government's Exhibit 6 for identification and ask you if you recognize this particular package?

A. Yes, that is definitely our pack.

Q. And is this your cover, or binding, or packing? A. Yes.

Mr. Whitney: It is immaterial, if your Honor pleases, not binding on the defendant.

The Court: They haven't offered it. He just wants you to see it.

Mr. Eubank: I would like to offer this as Government's Exhibit 6 in evidence.



(Testimony of Lola Long Darling.)

The Court: Has it been identified by this witness?

Mr. Eubank: Yes.

The Court: Is that some of the dates you sent over here?

The Witness: Yes, that is our pack.

The Court: It may be received.

(Said Package was received in evidence and marked as Government's Exhibit No. 6.)

Q. (By Mr. Eubank): Now, in regards to the invoices that are in evidence now as Government's Exhibit 3, you have testified that these prices are based upon the 45 cents a pound?

A. Yes, that is right. [41]

Q. Now, at this time is it possible for you to tell the poundage that was shipped in these, approximately, or can that be done?

A. That can be done from that. I wouldn't know offhand without a pencil and paper.

Q. If it is necessary that we compute the poundage, would you explain how we would do it from those figures?

A. There would be 39 cases, and there is four three-pound—

Q. Cartons? A. Yes.

Q. So we would multiply the three pounds times the four, times the 39 cases? A. Yes.

Q. And then we would have the total poundage on each of those boxes? A. Yes.

Q. Mrs. Darling, in regards to your Long Date

(Testimony of Lola Long Darling.)

Gardens, are you a grower-wholesaler? What is your relative position in that particular foodstuff field?

A. Well, we were a grower. We had 52 acres in dates, but we don't grow them now.

Q. At the time of this transaction, were you or were you not a grower?

A. No, I wasn't.

Q. You weren't at that time? [42]

A. No.

Q. The dates that you had, how did you procure them?

A. I got them from a grower in the Coahuila Valley.

Q. And how did you buy the dates from this grower? Were they raw?

A. No, they were processed already for repacking.

Q. For repacking? A. Yes.

Q. Where was the packing done?

A. At our packing plant in Pasadena.

Q. And the packing was done by your company?

A. Yes.

Q. In the price of 45 cents a pound, in relation to the type of date that you were packing, do you know what the market was in Los Angeles and Pasadena at that time?

A. No, I don't recall that, but I got the best grade of fruit that I could get, like we have for our retail business of our own.

Q. And the amount that you charge, or that you

(Testimony of Lola Long Darling.)

contracted with Acme Distributing Company, was that a usual price for that type of fruit?

A. Well, for that good of a fruit, I would say Yes.

Q. And at that time, that was the market price, that was your market price at that time?

Was that your market price? [43]

A. Well, wholesale, yes, I would say that would be it, but not retail.

The Court: We will suspend until two o'clock. Keep in mind the Court's admonition.

(The noon recess was taken.)

Two o'Clock P.M.—September 18, 1956

Court resumed pursuant to recess.

Present: Same as before.

The Court: You may continue.

**LOLA LONG DARLING**

resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Eubank:

Q. Mrs. Long, before you received the final telephone call that you testified to before we left this morning, did you send a final—and this is also after you received the \$500, did you send a statement of account to the Acme Distributing Company?

A. At the end of the month of November? [44]

(Testimony of Lola Long Darling.)

Q. Yes.           A. Yes, I did.

Q. At the end of December?

A. I would have to look on those sheets there to see what was the last date I made.

Q. I show you Government's Exhibit 3 in evidence, and see if you can tell by that?

A. Well, December 14th evidently was my last bill that was sent, and that was for the last shipment.

Q. That was for the last shipment. And do you recall that you sent a statement after that in which you put in the \$500 that you had received?

A. Sent it to them?

Q. Yes.           A. I don't recall that I did.

Mr. Eubank: Would you mark this Plaintiff's Exhibit 7 for identification?

The Clerk: Government's Exhibit 7 for identification.

(Said Invoices were marked as Government's Exhibit 7 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 7 for identification, and ask you if you recognize this document?

A. Yes, that was the final one that I sent after I didn't receive payment from the 14th, for the whole total. [45]

Q. And do you recognize this document?

A. Yes. Yes.

Q. Is it a part of your records, or would it be a part of your records?

(Testimony of Lola Long Darling.)

A. Yes. That was the copy sent to them, wasn't it, or was that the copy that I sent to Mr. Renner?

Q. Yes. Now, in regard to this particular copy, can you tell the date that it was sent?

A. Well, this is dated December 30, 1954.

Q. And what relationship did that date have to the \$500 that was paid on account?

A. Well, it was here that it is taken off of the total.

Q. And to your recollection, this is the actual——

A. Balance.

Q. ——balance due that you claimed from Acme Distributing Company at that time?

A. Yes.

Mr. Eubank: I move to offer this Government's Exhibit 7 for identification in evidence.

Mr. Whitney: I object to it as not properly identified.

The Court: It may be received.

(Said Invoices were received in evidence and marked as Government's Exhibit No. 7.)

The Court: You said you mailed statements to this company in Tempe? [46]

The Witness: Yes.

The Court: Were they returned to you?

The Witness: No.

The Court: They were not?

The Witness: No.

Q. (By Mr. Eubank): One item that I haven't cleared up too much. I show you Government's Exhibits 2 through 2-M, and ask you to tell the Jury

(Testimony of Lola Long Darling.)

how many separate shipments that you made to the Acme Distributing Company?

A. There is 14 bills of lading; that should be the total.

Q. There would be that many shipments then?

A. Yes.

Q. On that particular type of date, state whether or not there were different qualities of the date that you were shipping into Arizona?

A. Well, they make about four different grades, but I sent the best that I had.

Q. On all your shipments to Arizona, was the grade the same?      A. Yes.

Q. What was the retail price of this particular grade of date in California?

A. Sixty-five a pound we got retail.

Q. And when you say "we got"?—— [47]

A. In our retail business.

Q. When you sold them there?      A. Yes.

Q. When was the last time, to your knowledge, that your dates had been shipped for retail market here in Arizona?

A. Well, just when I sent it to them, as far as anything going into Arizona.

Q. Okay. How far back from that point?

A. I don't know of anything before December of 1951, or November, was it? Is that what you mean, before?

Q. That is right. Why can't you testify before that date as to what was shipped into Arizona?

A. Nothing was sent by me.

(Testimony of Lola Long Darling.)

Q. In other words, your testimony is that from December of 1951 to the time of the shipping to Acme Distributing Company, your date was not shipped into Arizona, is that correct?

A. No, not for wholesale.

Q. Not for wholesale? A. No.

Mr. Eubank: No further questions, your Honor.

### Cross-Examination

By Mr. La Prade:

Q. Mrs. Darling, you testified on direct examination that [48] the terms of your sale were ten days, net thirty. Would you explain that to the Jury?

A. Well, that is what we allow any of our customers that we wholesale any of our goods to.

Q. Just explain it.

A. Well, if they pay it in ten days, that is what we allow, and if they don't pay us within thirty, then we would have to do other means, I mean, a form of collection.

Q. You mean a discount if paid in ten days, but due within 30 days?

A. No. We just figured we would give them the ten days, but if they couldn't make it within the ten, we would leave them the thirty, but not over that.

Q. Referring to Government's Exhibit 7 in evidence, the invoice is dated November 30. Would it be my understanding from these that your having sent these statements out on or about December 30.

(Testimony of Lola Long Darling.)

that they would not be due until thirty days after that, is that correct?

A. No, from the date of the invoice. Each invoice was individual, and then they didn't pay them, so I just put whatever was for November for that month, see.

Q. Referring to Government's Exhibit No. 2 in evidence, and 2-A through M in evidence, can you tell from those what the date of your last shipment was to Arizona, as you have testified? [49]

A. This is December the 13th.

Q. And that was the last shipment you made to Arizona, was on December 13, 1954?

A. To my knowledge, yes, that is the last.

Q. Were there any more orders placed with you after that day? A. No.

Q. Then the date of the order for the last shipment was probably some few days before you shipped it, wouldn't that be correct?

A. Well, there for a while he was calling me almost every day.

Q. What I mean is, you say your last shipment went out on December 13th? A. Yes.

Q. So would it be correct just to presume that the order was placed some time prior to then, the day before, or some days prior to that?

A. Yes.

Q. Do you have any independent recollection when the last order was placed for dates?

A. It was probably just about a day ahead of that. They even called and wanted a shipment sent



(Testimony of Lola Long Darling.)

out on Sunday, and I said the trucking company didn't go out on Sunday, but whoever called informed me they did, so I sent out one shipment [50] on Sunday.

Q. So if I told you December 13th was on Monday, and the 12th was on Sunday, then the last order would have been placed on Saturday, the 11th?

A. Whatever day is on there is the day it went out, the shipment went out.

Q. I am speaking of the date the order was placed. You say it was asked it be shipped on Sunday. Was it perhaps the day before Sunday that that request was made?

A. I would say probably so.

Q. Do you have any independent recollection of what day of the week or date of the month that you received, as you have testified you received the Government's Exhibit No. 4?

A. Well, I was thinking it was on a Monday or Tuesday, but I'm not positive.

Q. Mrs. Darling, if you received the last order for merchandise which you actually delivered on, say, Saturday, the 11th of December, and you received the \$500 money order on either Tuesday or Wednesday or Monday of the following week, then would it not be true that you did not ship any merchandise by virtue of having received some token payment, as the Government has alleged?

A. Well, I would say that is the only reason I sent it, on account of me receiving the check. If I

(Testimony of Lola Long Darling.)

hadn't received the check, there wouldn't have been any merchandise sent out. [51]

Q. Isn't it true you received the check after you shipped the last shipment of dates?

A. No, I have the thing checked off as the 12th, and the shipment was sent the 13th.

Q. Mrs. Darling, let me call your attention to the fact that the date on the Government's Exhibit No. 4 in evidence is postmarked December 13th?

A. Yes.

Q. May I note the presumption that if that was mailed on that date, then perhaps you received it on Tuesday the 14th?

A. Well, I thought it was either Monday or Tuesday. It could have been an error on my paper there that I put, but the dates were definitely sent after I got the \$500 check.

Q. Then it would be your testimony that you did receive the check before you made the last shipment?

A. That is right.

Q. And can you explain to us why the last shipment is dated the 13th, the same day that the purported envelope from Phoenix, Exhibit No. 4, is also dated the 13th, which would have been in Phoenix on that date?

A. I couldn't say.

Q. Wouldn't it be more logical to assume that perhaps your shipment went out the day before you received the check?

A. It could have come in the morning's mail, because it didn't usually come until noon, see. [52]

(Testimony of Lola Long Darling.)

Q. May I again call your attention to Government's Exhibit 4, this envelope, and show you the date it was mailed, and the time it was mailed in Phoenix, as it purports, 11:30 a.m.? A. Yes.

Q. Then isn't it possible that your recollection is in error to the extent that you probably did ship the merchandise the day before you received the check?

A. No, I would say if there was any error, it was made on the little thing that I put there as to the date.

Q. What date did you testify you came over to Phoenix?

A. I was thinking it was around the 15th of December, 1954.

Q. Were there any moneys past due at that time?

A. It was all past due, except the \$500 that I had received.

Q. When, if ever, did you become acquainted with any particular person in the postal inspector's office?

A. Why, I contacted him when I came down here, and I had Mr. Renner work on this case for me.

Q. That was after you came over here?

A. Yes.

Q. You didn't have any conversations over the phone?

A. I talked to someone in Pasadena. It was the F.B.I. there. [53]

Q. Referring to Government's Exhibit No. 3,

(Testimony of Lola Long Darling.)

these invoices with the dates and the quantity, on November 24, 26, 30, those are the dates the merchandise was shipped?      A. Yes.

Q. And it would be ten days, net thirty, that the money was due after those dates, is that correct?

A. That is correct. That is the way we sent all of our billing.

Q. Wouldn't it be reasonable to presume that if Acme did owe you any money on account of merchandise shipped and received that they would have at least thirty days after the date of shipment in which to pay you?

A. Yes, I billed them, but I never received anything, or any word from them.

Q. Mrs. Darling, on Government's Exhibit 7 in evidence, I will call your attention to the last page thereof, where it states: "Paid on account, 12-12-54. Balance due—" opposite that date the figure "\$500.00"?      A. Yes.

Q. Wouldn't that be an incorrect date, inasmuch as the envelope is dated the day after that?

A. That is what I say, that is probably an error there, as far as that.

Q. So probably that should have stated 12-14, the date of receipt of the envelope? [54]

A. Well, whatever day it would have been.

Q. Mrs. Darling, what percentage of your total gross sales would a sale of \$17,000 have been in that particular year?      A. Pardon?

Q. You have testified this order placed totalled

(Testimony of Lola Darling.)

approximately \$17,000. Would that be a large percentage of your gross volume for the year 1954, or would that be an average sized sale? I am trying to develop how big a piece of business was that to your firm?

A. Well, that would be a fair-sized business.

Q. But it is your testimony that you received a large order in the sum of \$17,000 over the telephone, and that you shipped it after that conversation, is that right?

A. Just from the fellow's talk from the phone call. But it wasn't all sent at once. It was ordered each time, say, over the telephone, what he would want.

Q. You didn't know who you were talking to, did you?

A. No, I asked them, and they just says Acme Distributing in Tempe.

Mr. La Prade: That is all.

Mr. Eubank: I have no further questions.

The Court: That will be all.

Mr. Eubank: I request that this witness be allowed to be excused at this time. [55]

Mr. Whitney: No, I would rather not, at least until tomorrow, and think this thing over.

The Court: You let us know in the morning, then. That is time enough to think it over. If you don't want to call her, I will excuse her then. Call your next witness.

Mr. Eubank: Mr. McRuer.

## DUNCAN McRUER

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

## Direct Examination

By Mr. Eubank:

Q. Your name is Duncan McRuer?

A. That is right.

Q. You are the local manager of Watson Brothers Trucking Company at 241 South 13th Avenue here in Phoenix, Arizona?

A. That is right.

Q. Mr. McRuer, how long have you been with Watson Brothers?      A. Since June of 1949.

Q. And how long have you been in the trucking business?      A. Well, since 1939.

Q. Do you recognize the name of Ben B. Hoffman?      A. Ben Hoffman, yes.

Q. And do you recognize the name Acme Distributing Company?      A. Yes, sir. [56]

Q. And do you recognize the name Long's Date Gardens, Pasadena, California?      A. Right.

Q. Do you recognize the name of C. A. Glass Company of Los Angeles, California?

A. Yes.

Q. Do you recognize the name of Gavin Brothers in Seattle, Washington?      A. No, I don't.

Q. Do you see Mr. Ben Hoffman in this room?

A. Yes, Mr. Hoffman is sitting right behind you.

Q. Is that this gentleman seated here?

A. That is right.

(Testimony of Duncan McRuer.)

Mr. Eubank: May the record show that Mr. McRuer has identified Mr. Hoffman.

Mr. Whitney: He is sitting in court here. You don't need any further identification than that.

Q. (By Mr. Eubank): Mr. McRuer, you are here under a subpoena duces tecum of the Government, isn't that correct? A. That is right.

Q. And we asked you to bring your company's invoices on shipments made by Long's Date Gardens in Pasadena, and C. A. Glass Company, that were made through your local office, is that correct? [57]

A. That is right.

Q. Did you bring those with you?

A. Yes, I did.

Q. Now, for the jury's information, can you explain what these documents are?

Mr. La Prade: If your Honor please, can they be marked for identification before questioning on it?

The Court: I think so.

Mr. Eubank: Mark these for identification Government's Exhibit 8, and it would be 8-A through whatever letter.

Q. (By Mr. Eubank): Mr. McRuer, are the C. A. Glass shipments included in this stack?

A. They are in that also. There is also one in there from the California Date Garden Company, or something like that.

Q. While we are waiting for these to be marked for identification, would you tell the jury the type of record these are?

A. These are copies of freight bills that cover

(Testimony of Duncan McRuer.)

a shipment when a shipment is given to a trucking company or common carrier. They issue a bill of lading which is taken to the office of the company, and then they cut a freight bill, type the information on the freight bill, and that moves with the shipment to the city where the shipment is going. In this case they came from Los Angeles to Phoenix with this freight [58] bill. Then when we deliver the dates to Mr. Hoffman, he signs the freight bill, and one copy goes into our home office and one into our files.

Q. And these copies you brought here today are from the Phoenix files?

A. From the Phoenix files.

The Clerk: Government's Exhibits 8, 8-A to 8-T, inclusive, for identification.

(Said freight bills were marked as Government's Exhibits 8, 8-A to 8-T, inclusive, for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibits 8 through 8-T, inclusive, and ask you if those are the records that you brought with you this afternoon?      A. They are.

Q. Now, are these the type of instrument you were just telling the jury about?

A. Yes, it is our plain ordinary freight bill.

Q. In this particular case, what shipment would these have covered?

A. They are identified by a freight bill number which is our identifying number. Then this shows



(Testimony of Duncan McRuer.)

a shipment from the C. A. Glass Company of Los Angeles, California, on their bill of lading No. 1772, shipped on the 15th of November, 1954, left Los Angeles on truck No. 5759, to the Acme Distributing [59] Company of Tempe, Arizona, and the signature of delivery is the Acme Distributing Company, by Ben Hoffman.

The Court: How did we get to the Glass Company? We were talking about the Long's Date Gardens.

Mr. Eubank: Most of these are the Long Date Gardens.

The Court: Well, then, refer to those. You will have this thing all mixed up here. I can't follow you.

Mr. Eubank: I was going to——

The Court: I don't know what you are doing, but you do it the way I say.

Mr. Eubank: Would you remove the C. A. Glass ones?

The Witness: Here is the Long Date Gardens shipment of the second of December, 1954, covering 97 cases of dates moving from Long's Date Gardens to Acme Distributing Company.

Q. (By Mr. Eubank): Would you look these over and make sure all of this group are of Long Date shipments?

A. These are all Long. These are the Long's. (Handing to counsel.)

Mr. Eubank: Now, may the record show that

(Testimony of Duncan McRuer.)

the following exhibits are Long's Date shipments: 8-E, F, G, H, J, K, L, M, N, O, P, Q, S and T.

I now move that these freight bills be accepted in evidence.

Mr. Whitney: May I ask one question on voir dire? [60]

The Court: All right.

Q. (By Mr. Whitney): Mr. Witness, examining Government's Exhibit 8 for identification, what bill shows the last shipment?

A. The last one?

Q. Yes. (Witness hands document to counsel.) That is on 12/13?

A. Left Los Angeles on 12/13.

Mr. Whitney: We have no objection to them.

The Clerk: Government's Exhibit 8-E, 8-F, G, H, J, K, L, M, N, O, P, Q, S and T in evidence.

(Said Freight bills were received in evidence and marked as Government's Exhibits 8-E, 8-F, 8-G, 8-H, 8-J, 8-K, 8-L, 8-M, 8-N, 8-O, 8-P, 8-Q, 8-S and 8-T.)

Q. (By Mr. Eubank): Now, Mr. McRuer, I would like you to look at these freight bills again, and ask you whether or not, or how long you have known Ben Hoffman in the Phoenix area?

A. Since some time in 1950, the summer of 1950, I believe.

Q. On these particular shipments, do you recall how they were handled by your company upon receipt in Phoenix?

(Testimony of Duncan McRuer.)

A. Well, these date shipments were hauled to our dock when they came in on the line truck, and they were unloaded onto our freight platform and held there for Mr. Hoffman to pick up. He and an assistant would come by with a truck and pick them up. [61]

Q. Was that the usual way he did business when he did business with Watson Brothers?

A. He said he was doing business as the Acme Distributing Company. He picked them up at our dock.

Q. Was there any payment that was required of him before the dates were delivered to him?

Mr. Whitney: I object. Immaterial.

The Court: He may answer.

The Witness: He paid cash on the freight bill to us before we would deliver the merchandise to him.

Q. (By Mr. Eubank): Then these signatures, what relation did they have to the delivery?

A. He would sign for delivery at the time that he paid the freight bill, or at the time he went out on the dock to take the truckload, load the dates in the truck.

Q. Are you acquainted with his signature?

A. Yes, I have seen it several times.

Q. Did you, or did he sign his signature before you on these freight bills?

A. On some of them.

Q. On some of them?           A. Yes.

Q. Would you recognize his signature if you saw it? [62]

(Testimony of Duncan McRuer.)

A. I believe so. It is a big characteristic signature on all the bills, and some of them were signed in front of me that I know is his signature.

Q. Could you say whether or not these are Ben Hoffman's signatures on the bottom of this freight bill?

A. This particular freight bill, because of this mark on here about the five-cent refund was signed in front of Mr. Hirsch, who is also subpoenaed. This one, this one, this one. This one. This one. These were all signed in front of Mr. Hirsch. This bill was probably signed in front of me because this is my writing where I have changed the freight rate.

Q. How is that signed?

A. Ben Hoffman, in the characteristic signature.

Q. By whom?

A. Acme Distributing Company, by Ben Hoffman.

Q. Would you go on through there, and would you say that is——

A. That is Ben Hoffman's signature, Acme Distributing Company, Ben Hoffman. Acme Distributing Company, Ben Hoffman.

Q. Let's see. These exhibits you have already said are Ben Hoffman's signature are 8-K, 8-L and 8-M?

A. Right.

Q. What about 8-N?

A. 8-N is Ben Hoffman, Acme Distributors, Ben Hoffman. [63]

Q. And 8-O?

A. 8-O, Acme Distributing, Ben Hoffman.

(Testimony of Duncan McRuer.)

Q. 8-J?           A. P, I believe.

Q. P?

A. Acme Distributors, Ben Hoffman.

Q. And those are all of his signature, is that right?  
A. I believe it is.

Q. And 8-Q?           A. Ben Hoffman.

Q. And 8-S?           A. Ben Hoffman.

Q. And 8-T?           A. Ben Hoffman.

Q. Isn't it true, Mr. McRuer, that on several occasions you observed Ben at your dock?

Mr. La Prade: Your Honor, I object to these leading questions.

The Court: He said he had seen him there several times. Go ahead.

The Witness: Yes, he used to come down in the morning and either wait for the truck, or shortly after the truck would come in, come in to get his dates.

Q. (By Mr. Eubank): These are in relation to the Long's Date [64] shipments?

A. Long Date shipments, yes.

Q. Did you receive a telephone call from the Long's Date Gardens in the latter part of December?

Mr. Whitney: Answer that yes or no.

The Witness: No.

Q. (By Mr. Eubank): In regard to the last transaction that you can recall in which Ben Hoffman appeared at the dock for dates, would you please describe the conversation that occurred between the two of you at that time?

(Testimony of Duncan McRuer.)

A. Well, the last time I saw Ben Hoffman he came to the terminal to ask if the dates, if his dates had come in yet, and I told him, No. And he said, Would you teletype Los Angeles to see if they are on a later truck? And I said, "I don't think there will be any dates, because yesterday after you were down we received a teletype from our Los Angeles office that the——"

Mr. Whitney: I object to the teletype conversation.

The Court: He is telling what he told the defendant. Go ahead.

The Witness (Continued): We had received a teletype from our Los Angeles office saying not to deliver the dates to Hoffman, [65] to Acme Distributing. The shipper had requested they be held. And I teletyped them back they were already delivered, picked up by the consignee, Ben Hoffman, Acme Distributing. And because of the statement they were holding them, I didn't expect them in the next day. When I told that to Mr. Hoffman he turned around immediately, left the office, got in his car, and drove off.

Q. (By Mr. Eubank): Did he say anything?

A. He just asked me, "They said hold the dates and not deliver them right after I had gotten them, or shortly after I had gotten them," or words to that effect. He wanted to be sure they had told me not to deliver the dates. And I said, "After you got them, that is right."

/

(Testimony of Duncan McRuer.)

Q. That Ben Hoffman you are referring to is the same gentleman you have identified here?

A. Yes, the same Hoffman.

Q. And is this the gentleman that on occasions picked up Long's dates on your dock?

A. That is right.

Q. Your testimony, Mr. McRuer, is that all of the shipments were delivered to Acme Distributing Company by Ben Hoffman, at your dock. Was there any occasion that a delivery was attempted at the Tempe office of Acme?

A. I believe the first shipment that we got for Acme [66] Distributors—Are you referring to dates, or just freight?

Q. Dates.

A. No, we didn't attempt delivery on any dates, I don't believe.

Q. Where did you get that information? I mean, were you under a specific order from Acme, or why didn't you make the delivery?

A. Before that, a couple of months before that we had had some salmon for Acme Distributors which we were unable to deliver because they had no warehouse, no place in Tempe at that address. And later we had delivered the salmon to another place here in Phoenix, a store here in Phoenix, and at that time Mr. Hoffman said he would contact us when shipments were coming, or he knew freight was coming, so before the dates ever came in he called in and said, "I am expecting some freight."

In fact, he called for several days, I believe, and

(Testimony of Duncan McRuer.)

said, "I am expecting some freight, and hold it, and I will tell you where to deliver."

Q. With regard to Mr. Hoffman at the freight dock, what was his demeanor at the freight dock? Did he spend quite a bit of time there awaiting shipments, or did he just come in at certain times when you notified him?

Was there anything that you, in your own knowledge, remember of these circumstances? [67]

A. I would say, as a rule, he almost every day that there was a shipment, he would be there waiting for the shipment, or he would arrive within 15 or 20 minutes after the truck did with the dates. We never called him to come after them. He always came down and waited for them, or arrived very shortly after the truck did.

Mr. Eubank: No further questions.

#### Cross-Examination

By Mr. Whitney:

A. Mr. McRuer, this last shipment here from the Long's Date Gardens to Acme Distributing Company that you said went out of Los Angeles on the 13th of December, 1954? A. Right.

Q. Where did you pick up those dates?

A. The dates?

Q. Yes.

A. It would appear from the way this is worded here that they were either brought to our terminal



(Testimony of Duncan McRuer.)

by the Long Date Company, or by some local transportation company.

Q. Is there anything on there to tell what day you received them?

A. Yes, the rules state we are supposed to date this freight bill the day we receive the shipment.

Q. And the date you sent it out? [68]

A. And the date you sent it out.

Q. I see. You didn't have any conversation with Mrs. Darling of the Date Gardens in connection with this matter?

A. Not until she was in Phoenix personally.

Q. I mean at the time of the shipment?

A. No.

Mr. Whitney: I see. That is all.

Mr. Eubank: No further questions.

(Witness excused.)

Mr. Eubank: I call Mr. Hirsch.

### MITCHELL HIRSCH

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Mitchell Hirsch? A. Yes.

Q. You are the District Sales Manager of Watson Brothers Trucking Company?

A. That is right.

Q. That is located at 241 South 13th Avenue

(Testimony of Mitchell Hirsch.)

in Phoenix, Arizona?      A. That is right.

Q. I want to show you Government's Exhibits in evidence [69] 8-F, E, Q, H, J, K, L, M, N, O, P, G, S and T, and ask you if you recognize those documents?

A. I recognize this one. This one. I recognize these.

Q. How do you specifically recognize these, Mr. Hirsch?

A. Well, we have a provision in our shipping tariff that if the customer picks up a shipment on our dock, we make a dock delivery allowance of 5 cents a hundred, and at the time these shipments came in, Mr. Hoffman came into our office, and I act as rate clerk before 10:30, and he came over to me and said he heard he was entitled to an allowance of 5 cents a hundred, and I said it was true, so I took these bills and made the adjustment to allow him 5 cents a hundred, and that is my writing there where I did it.

Q. On these particular bills did Mr. Ben Hoffman sign before you?

A. That is right, he signed the bills before me, and I took them to the cashier where he paid the cashier.

Q. Do you know Mr. Hoffman by sight?

A. Yes, I do.

Q. Is he in this courtroom?

A. Yes, he is.

Q. Would you point him out to the jury?

A. The gentleman right over there.

(Testimony of Mitchell Hirsch.)

Q. Had you known Ben before this particular transaction?

A. I have known him all during the time he was shipping [70] at this particular time, in other words, while he was shipping dates I knew him, saw him all the time down there, practically every day.

Q. On each of these exhibits here, first, 8-F, is that Mr. Hoffman's signature? A. No.

Q. That isn't?

A. It doesn't look like it to me.

Mr. Whitney: I beg your pardon?

The Witness: It doesn't look like it to me.

Q. (By Mr. Eubank): 8-F is not Mr. Hoffman's signature?

A. The rest of these are. That could be. I guess he just scribbled it a little bit. When I look at these others, it could be his signature. I am not sure of that one. It is sort of a scribbled deal.

Q. 8-F, your testimony is you are not sure of. How about 8-E?

Mr. Whitney: Mr. Attorney, what is the purpose of this? To show he got the stuff?

Mr. Eubank: This is identity, yes, sir.

Mr. Whitney: You mean to identify Mr. Hoffman?

Mr. Eubank: To identify Mr. Hoffman with the shipment and Acme Distributing Company.

Mr. Whitney: We admit Mr. Hoffman got the stuff from [71] the Date Gardens, Long's Date Gardens.

Q. (By Mr. Eubank): You say 8-E is Mr.

(Testimony of Mitchell Hirsch.)

Hoffman's signature?           A. That is right.

Q. And 8-G?           A. Yes.

Q. 8-H?           A. That is right.

Q. And 8-J?           A. Yes.

Q. Now, in the shipments to Mr. Hoffman there at Watson Brothers Company, did you observe Mr. Hoffman on the docks?

A. Yes, sir, at various times.

Q. How did you observe him? I mean, waiting for these shipments?

A. We would susually get a phone call. He called once or twice during the day about dates arriving, and as sales manager of the company, I always checked the mainifest each day to see what shipments are coming in, who we are doing business with, and we would notice his name on the manifest, and get a call, and I would answer, or one of the girls, and he would want to know if dates were in. He would always come to the office to pay the bills, and he would always be on the dock, and I would see him. Just in the normal business I did see him every day, I guess. [72]

Mr. Eubank: I have no further questions.

Mr. Whitney: No questions.

(Witness excused.)

The Court: We will have our afternoon recess. Keep in mind the Court's admonition.

(The afternoon recess was had.)

The Court: You may continue.

GEORGE RENNER

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is George Renner?

A. Yes. George L. Renner.

Q. And you formerly resided at 515 East Oregon  
Street in Phoenix, Arizona? A. Yes, sir.

Q. Where do you reside now, Mr. Renner?

A. In Flagstaff, Arizona.

Q. What is your occupation now?

A. I am the manager of the Flamingo and El  
Rancho Motor Hotel in Flagstaff.

Q. Do you recall the name of Mr. Ben Hoff-  
man? A. Yes, I do. [73]

Q. Do you recall the name of Acme Distributing  
Company? A. Yes, I do.

Q. Do you recall the name of Long's Date  
Gardens? Long's Date Gardens, Pasadena, Cali-  
fornia? A. Yes, sir.

Q. Would you please inform the Jury when you  
first heard of the name of Long's Date Gardens?

A. In December 15 of 1954, Mrs. Lola Darling  
came up to me and asked me to assist her in locat-  
ing a business known as the Acme Distributing  
Company, and a man known by the name of Ben  
Hoffman.

Q. And what was your business capacity at that  
time?

(Testimony of George Renner.)

A. I held a commission, a deputy commission with the Maricopa County Sheriff's Department, and I was doing some investigating work.

Q. And were you employed by the Adams Hotel?

A. Yes, sir.

Q. In what capacity?

A. As a house officer.

Q. In your investigation, were you successful in locating Acme Distributing Company?

A. Yes, I was.

Q. And where did you locate Acme Distributing Company?      A. At 818 Apache Boulevard.

Q. What city? [74]

A. On the Tempe-Mesa road.

Q. Was there anyone present on the premises at the time you were there?      A. No, sir.

Q. Did you look into the, what was it, a building? Office?

A. It was a vacant store, but it had the name of Acme Distributing Company on the window.

Q. And did you look through the window?

A. Yes, sir.

Q. What was in the building?

A. There was nothing to be seen.

Q. Was there any furniture to be seen?

A. No.

Q. Nothing in there?      A. No.

Q. Was there anyone around that was able to inform you of the whereabouts of Acme?

A. I spoke to the hotel owner who also owns the

(Testimony of George Renner.)

property in front, and he don't know too much about Mr. Ben Hoffman, and he said he stops there occasionally.

Mr. Whitney: I object to that as hearsay.

The Court: All right. Don't state what he told you.

Q. (By Mr. Eubank): How long did you work on the case, Mr. Renner?

A. From the 15th until the 23rd. [75]

Q. Were you successful in that time in locating Acme Distributing Company? A. Yes.

Q. And where did you locate them?

A. At 818 Apache Boulevard.

Q. I see. Other than that location, were you successful in finding any other location?

A. No, sir.

Q. And did you find Ben Hoffman?

A. Yes. I seen him on several occasions.

Q. Did you happen to talk to him in regard to this? A. No, sir.

Q. On the occasions that you saw Ben, would you please state what occasion that was?

A. At the Watson Freight Lines, he was unloading dates from the docks on two pickup trucks.

Q. And was there any other time that you saw him?

A. No, that was the times I seen him.

Q. Do you see Mr. Hoffman in this room?

A. Yes.

Q. Can you point him out?

A. Sitting right in back of you.

(Testimony of George Renner.)

Q. The gentleman here? A. Yes.

Mr. Eubank: No further questions. [76]

Cross-Examination

By Mr. La Prade:

Q. Mr. Renner—Is it Renner?

A. Yes, sir.

Q. You state that Mrs. Darling employed you personally to do some investigating? A. Yes.

Q. That is, she came over here and employed you? A. Yes.

Q. What was the date, sir?

A. That was the 15th of December, 1954.

Q. And it was after she employed you that you saw Mr. Hoffman? A. Yes.

Q. At the Watson Freight dock?

A. Correct.

Q. Are you sure of your dates, sir?

A. Yes, sir.

Q. You saw Mr. Hoffman on the Watson Freight dock? A. Yes.

Q. After she employed you, because you were looking for him? A. Yes.

Q. What was he unloading or loading?

A. Dates. [77]

Mr. La Prade: That's all.

The Court: Is that all from this witness?

Mr. Eubank: Yes.

The Court: You may stand aside.

(Witness excused.)



Mr. Eubank: At this time I would like to call Mr. William W. Pritchett.

WILLIAM W. PRITCHETT

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is William W. Pritchett?

A. That is right.

Q. And you own a building at 818 Apache Boulevard in Tempe, Arizona? A. Yes, sir.

Q. What type of building is that, Mr. Pritchett?

A. Well, it is just a small office space, two rooms, about 10 by 12.

Q. Is there any storage space in conjunction with it? A. No.

Q. Do you operate your own business out of that space?

A. I rent those two offices out. I have a combination trailer court and some cottages, and those two offices. [78]

Q. Do you recognize the name of Ben Hoffman?

A. Yes, sir.

Q. And do you recognize the name of Acme Distributing Company? A. Yes.

Q. Do you see Mr. Hoffman in this room?

A. Yes, sir.

Q. Can you point him out to the jury, please?

A. The man behind you.

(Testimony of William W. Pritchett.)

Q. Did he in the name of that company rent any space from you? A. Yes, sir, he did.

Q. Approximately when was that, Mr. Pritchett?

A. Well, he started to rent on July 1st, 1954.

Q. And how long did he rent?

A. Until March 1st, 1955.

Q. Now, you lived close to your building, is that correct?

A. Well, I live in back of it. It was a store building first, you see, and I remodelled it and made my living quarters and two offices.

Q. Did you live there at the time that this property was rented to Mr. Ben Hoffman as Acme Distributing Company? A. Yes, sir.

Q. Did you observe the operation of Ben Hoffman in this office space? [79]

A. What do you mean by observe in the operation?

Q. Well, living in the proximity that way, did you at any time observe any of the, for example, the comings and goings of Mr. Hoffman, the amount of people that called in his office?

A. Yes, I don't believe I could help notice that.

Mr. Whitney: Your Honor, I believe that is immaterial.

The Court: We will see. Go ahead.

Q. (By Mr. Eubank): The amount of furniture and that sort of thing he had in his office?

A. Yes, sir.

Q. Would you please tell the jury what furniture, for example, was in the office?

(Testimony of William W. Pritchett.)

A. A desk and two chairs.

Q. And was there any filing cabinet?

A. No.

Q. The different times you have observed the office, was there any documents or papers or that type of thing around in the office?

A. I didn't see anything outside of, you know, the license you get from the state of Arizona.

Q. And was there a sign to indicate the company that was in possession?

A. Yes, Acme Distributing Company was on the glass window, [80] glass front.

Q. Approximately how many times do you think you might have looked in there during this period of July 1st through March 1st?

A. That I might have looked in?

Q. Yes, into the office?

A. Well, a good many times, I guess.

Q. A good many times. In regard to Mr. Hoffman, did he spend most of his time at the office, or a great deal of time there? What, generally, was his office habit?

A. Well, he wasn't there very much.

Q. By not very much, would you mean that, well, let's say during this period was he there several times a week?

A. Well, he was there almost every day, but maybe just long enough to pick up his mail. Some days he wouldn't even go in the office. He would pick up the mail.

(Testimony of William W. Pritchett.)

Q. Your testimony would be that he would usually show up for a short time?

A. Yes. About every day.

Q. Did he have a telephone in his office?

A. No, sir.

Q. Did he at any time hire anyone, that you know of, to act as a receptionist in the office?

A. Yes, he hired a girl from the Court there for a little while. [81]

Q. Did he have any other hired personnel in conjunction with the company?

A. Not that I know of.

Q. Did you ever see any books or accounts?

A. No, sir.

Q. Mr. Pritchett, you are here under a subpoena duces tecum. Do you have your rental records?

A. Yes, I have the duplicate receipts. I make my receipts in duplicate. He got the original and that is the duplicate.

Mr. Eubank: Mark this for identification, please.

The Clerk: Government's Exhibit 9 for identification.

(Said rent receipts were marked as Government's Exhibit 9 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 9 for identification, and ask you if you recognize these?

A. Yes, sir, I wrote every one of them myself. That is my signature.

(Testimony of William W. Pritchett.)

Q. And these are what?

A. They are rent receipts. Rent receipts for the office.

Q. And they are for what periods?

A. The date here, 7/1 to 8/1.

Mr. Eubank: I would like to offer Plaintiff's Exhibit 9 for identification in evidence. [82]

Mr. Whitney: I object, on grounds it is wholly immaterial and cumulative.

The Court: It may be received.

The Clerk: Government's Exhibit 9 in evidence.

(Said Rent Receipts were received in evidence and marked as Government's Exhibit No. 9.)

Q. (By Mr. Eubank): I show you Government's Exhibit 9 in evidence, and ask you if you will tell us the dates that those cover, or from what period the receipts cover?

A. The rent covered?

Q. Yes.

A. Well, that was wrote on 7/1, and it paid the rent from 7/1 to 8/1, the first one.

You want to go through all of them?

Q. Let's see, are these in order?

Q. Yes, I think so.

Q. Just skip through to the last date there.

A. Well, the last date was January the 15th.

Q. What year? A. 1955.

Q. And that paid it to when?

(Testimony of William W. Pritchett.)

A. That paid from January 1st to February 1st, 1955. That was 15 days late, see.

Q. All right. Do you recognize the name of Nadine Crane? [83]            A. Dean Crane?

Q. Nadine Crane?            A. Oh, Nadine Cram.

Q. Oh, Cram, pardon me. And who was Nadine Cram?

A. That was a tenant of mine in the trailer court that worked for Mr. Hoffman.

Q. Mr. Pritchett, when Mr. Hoffman contracted this space, did you discuss his business with him?

A. Well, not very much. He just told me he was a wholesale distributor, and he wanted an office, so that is about all—We didn't talk about it very much.

Q. Did he describe what he expected to do with the office in the way of personnel, or anything like that?            A. No, sir.

Q. Did you have anything to do with the hiring of a receptionist?            A. Not a thing.

Q. Did Mr. Hoffman mention anything to you about warehouse, or warehouse space, that you recall?

A. Well, I believe he did ask me if I had any storage room, and some time he might need some, and I told him I didn't have, didn't have any.

Mr. Eubank: No further questions.

Mr. Whitney: No questions.

The Court: That will be all.

(Witness excused.) [84]

Mr. Eubank: I would like to call Nadine Cram.

NADINE CRAM

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is Nadine Cram?

A. That is right.

Q. C-r-a-m? A. Yes.

Q. And you are presently residing at 122 North  
29th Street here in Phoenix, Arizona?

A. Yes.

Q. And you are presently a senior in Phoenix  
Union High School in Phoenix? A. Yes.

Q. Nadine, do you recall the name of Ben Hoff-  
man? A. Yes.

Q. And Acme Distributing Company?

A. Yes.

Q. Tempe, Arizona? A. Yes.

Q. Do you see Mr. Hoffman in this room?

A. Yes, he is. [85]

Q. Will you point him out, please?

A. He is at the far table in the brown suit.

Q. Do you know Mr. William Pritchett?

A. Yes.

Q. Would you tell the Jury how you know Mr.  
Hoffman? And Acme Distributing Company?

A. Well, I was living in Mr. Pritchett's trailer  
court, and Mr. Pritchett told me he had rented an  
office to a Mr. Hoffman, and Mr. Hoffman needed a

(Testimony of Nadine Cram.)

receptionist in his office and he was wondering if I would work for him. It was nearly two years ago.

Q. Approximately what date was that?

A. Well, it was either later July or early August.

Mr. Whitney: What year?

The Court: She said two years ago.

The Witness: Let's see. I am a senior this year, and it was between my Freshman and Sophomore year, during summer. About 1952 or 1953.

Q. (By Mr. Eubank): Now, where, by the way, was this? Where was the motor court located?

A. It was 816 Apache Boulevard.

Q. 816 Apache Boulevard?

A. Yes, in Tempe.

Q. Where was the office of Mr. Hoffman located, do you [86] recall?      A. 818.

Q. Now, what did Mr. Hoffman tell you when he hired you?

A. He told me that he was renting this office. He was connected with foods, and he was selling foods to the different stores around town, and he had ordered a phone to go in there, and I was supposed to act as receptionist and get the mail, and take care of any callers that came in, and if anyone phoned for him they would use Mr. Pritchett's court phone, and Mr. Pritchett was to ring a buzzer and I would go into the court phone and use that phone.

Q. And was a buzzer installed in the office?

A. Yes.

Q. Now, what was your pay to be?



(Testimony of Nadine Cram.)

A. \$10 a week.

Q. How long did you work for Mr. Hoffman in that capacity?

A. Approximately two weeks.

Q. And would you explain or describe to the jury the facilities of the office, what furniture was there?

A. There was a desk and two chairs.

Q. Were there any files? A. No.

Q. Were there any books or records?

A. None.

Q. Were there any books at all of any type? [87]

A. No.

Q. Was there any typewriter? A. No.

Q. At the time you were there, was a telephone ever put in? A. No.

Q. At the time you were there, how many calls did you answer on behalf of Acme?

A. Mr. Hoffman called at the office once.

Q. And that was the only telephone call?

A. Yes.

Q. In regard to Mr. Hoffman, how often was he in the office?

A. Well, he would come in sometimes every day to get the mail, and sometimes he wouldn't be in for a day or so.

Q. And how long would he stay in the office?

A. Just long enough to get the mail.

Q. Would you say that you were at the office most of the time alone, or with somebody else?

A. Well, sometimes my sister would come over to see me, but most of the time I would be by myself.

(Testimony of Nadine Cram.)

Q. In relation to Mr. Hoffman, while you were working there, those were the only times that he appeared was usually what, in the morning or in the afternoon? A. In the afternoon. [88]

Q. And did you ever open the mail?

A. No.

Q. Did you ever inquire of Mr. Hoffman of his business, other than the first meeting? A. No.

Q. Were there any shipments to this Acme Distributing Company?

A. None while I was there.

Q. Did any salesmen from any wholesale dealers call there personally while you were there?

Mr. Whitney: I think that is immaterial.

The Court: She may answer.

The Witness: Well, there was one gentleman that came, but I didn't know he was a salesman at the time that he came. I didn't know until later that he was a salesman.

Q. (By Mr. Eubank): Why were you terminated from your job, Nadine?

A. I don't know. I was there for quite a while, and he never did come, and then I believe it was through Mr. Pritchett that they told me that I wouldn't need to work there any more.

Q. Was there any explanation given?

A. No.

Mr. Eubank: No further questions. [89]

Mr. Whitney: No questions.

The Court: That will be all.

(Witness excused.)

KENNETH CLAUS

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is Kenneth Claus?

A. Yes, sir.

Q. And you were residing at 1815 East Thomas Road?

A. Yes, sir.

Q. In Phoenix, Arizona?

A. Yes, sir.

Q. And you have been engaged in fruit and date sales in the area, is that correct?

A. That is correct.

Q. Are you familiar with the name of Benjamin B. Hoffman?

A. Yes, sir.

Q. Would you recognize him if you saw him in this courtroom?

A. Yes, sir.

Q. Do you see him here?

A. Yes, sir. (Indicating.)

Q. This gentleman here? [90]

Q. And were you familiar with the name of Acme Distributing Company?

A. I was.

Q. And how were you familiar with that name?

A. Well, they sold dates.

Q. And who was that, when you say they sold?

A. Well, Mr. Hoffman and some other fellow by the name of Harris, I believe.

Mr. Whitney: What is the last name?

The Witness: Harris.

(Testimony of Kenneth Claus.)

Q. (By Mr. Eubank): Now, on or about December 8, 1954, did you happen to purchase any dates?

A. On December 8th, did you say, sir?

Q. Yes, sir, or thereabouts.

A. On December 8th, I did.

Q. Who did you purchase those dates from?

A. From Mr. Hoffman.

Q. Do you remember the type of dates they were? A. Yes, sir.

Q. What type were they?

A. They were Adeglish-Norris.

Q. Do you recall the company, the designation on the product?

A. I don't quite understand what you mean by a designation, sir. [91]

Q. The title, or the company's right name that was on the box, the type of the date and the name?

A. That was written on the box whose dates they were, is that what you mean?

Q. That is right.

A. As near as I remember, I believe it said Long's.

Q. May I see that slip, please?

A. Yes. (Handing to counsel.)

Mr. Eubank: I would like this marked as Plaintiff's Exhibit 10 for identification.

The Clerk: Government's Exhibit 10 for identification.

(Said Memorandum was marked as Government's exhibit 10 for identification.)

(Testimony of Kenneth Claus.)

Q. (By Mr. Eubank): I show you Government's Exhibit 6 in evidence and ask you if you recognize this box cover, or this type?

A. Yes, I do.

Q. And is this similar to boxes that you bought on December 8th?

A. Yes. I bought—Now, I won't say on December 8th. I bought dates at several different times, but I did buy dates during some of these periods that were in boxes like that.

Q. And those boxes you bought, were they from Mr. Hoffman?

A. I bought them from Mr. Hoffman.

Q. I show you Government's Exhibit 10 for identification, [92] and ask you if you recognize this document?

A. That is my writing. I wrote that bill.

Q. Fine. A. Yes, I recognize it, sir.

Mr. Eubank: We offer this Government's Exhibit 10 for identification in evidence.

Mr. Whitney: You say this is in your writing?

The Witness: Yes, sir.

Mr. Whitney: May I ask a question on voir dire?

The Court: All right.

Q. (By Mr. Whitney): That shows you purchased dates for a total of \$316.25?

A. Yes, sir, if that is what it says on the slip, sir.

Mr. Whitney: If the Court please, I object to it

(Testimony of Kenneth Claus.)

on the grounds that it is not binding on the defendant. It is in his handwriting.

The Court: It would only corroborate what he would say. He would say he bought that from him.

Mr. Whitney: The only thing he could use it for is to refresh his memory as to the dates.

The Court: I suppose so.

Q. (By Mr. Eubank): Mr. Claus, this date on this is December 8, 1954.

A. That was the date you asked me, sir.

Q. And on this document here, is this for your own records? [93]

A. It is, sir.

Q. And do you keep any other records but this record, I mean, of your purchase?

A. Well, I am like most fellows, if I buy some merchandise, at the end of the day I add them all up, how much it was for merchandise, and put them in my book, what it was for, and I went through all of my drawers where I had dates, pertaining to this, and I found five or six receipts here, so I brought them along.

Q. And these receipts were in your file?

A. They were in with all of my bills that I had thrown in a box like I keep them.

Q. Could you recognize that this was a sale from Ben Hoffman?

A. Well, during that period I wasn't buying them from anybody else, so it would have to be. I had two or three more here. That was all through the period of about a month.

(Testimony of Kenneth Claus.)

Mr. Eubank: I ask that that be admitted in evidence, the memorandum.

The Court: All right.

The Clerk: Government's Exhibit 10 in evidence.

(Said Memorandum was received in evidence and marked as Government's Exhibit 10.)

Q. (By Mr. Eubank): Now, Mr. Claus, can you look at this bill, and can you [94] tell from that what you paid a pound for these dates?

A. Well, from memory, they were all about at this time approximately this time, and a couple of other times here, but that time there, well, I will tell you how it was. Let me tell you how it was. I bought some here at one price, and a little bit later on there was another deal come up at a different price, and as near as I can remember, that was approximately 12 cents a pound.

Q. Let us go to the first price range. Approximately when was that?      A. Let's see.

Mr. Whitney: You mean you are going into the prices he paid for the dates?

Mr. Eubank: Yes.

Mr. Whitney: I object to it. It is not in the issues to be determined.

The Court: Objection overruled.

Mr. Eubank: You may answer.

The Witness: Well, it says here, I have two bills here made out by the Acme Distributing Company.

Q. (By Mr. Eubank): These are written by Acme and not by you?

(Testimony of Kenneth Claus.)

A. At least they are signed by Acme. This one here, I know I didn't write this, and I didn't mark that one paid. [95] These two here are the only two I have that are not made by myself.

Mr. Eubank: I would like these to be marked as Exhibits for identification 11 and 11-A.

The Clerk: Government's Exhibits 11 and 11-A for identification.

(Said Receipts were marked as Government's Exhibits 11 and 11-A for identification.)

Q. (By Mr. Eubank): I show you Governments Exhibits for identification 11 and 11-A, and ask you to identify those for us. Those are the ones you have just handed me, and you brought with you this morning, is that correct?

A. They are. Only these apples didn't come from him. Them apples I wrote on them, I just wrote on there to keep track of the apples I bought, but for the dates, they are.

Q. Where did you get those documents?

A. Those receipts?

Q. That is right.

A. I may have furnished the receipts. I don't know that, but Mr. Hoffman or either his aide filled these out and marked them, and I don't know which one filled in the writing, but one of them is marked Paid by "B," and one of them is marked Paid by Harris. I don't know. I may have furnished these slips. [96]



(Testimony of Kenneth Claus.)

Q. These receipts, where were these stored in your records?

A. That was in the box with all my other bills.

Q. Where did you get them?

A. The first time I dug them up, or now?

Q. No, now.

A. This time I got them out of the box.

Q. When?

A. About two or three days ago when I got this paper that said I had to come down here.

Mr. Eubank: I ask that these be admitted in evidence.

Q. (By Mr. Eubank): You didn't buy these apples from Mr. Hoffman, did you?

A. No, sir, I didn't.

Mr. Whitney: If the Court please, I don't think these have been properly identified, and we object to them on that ground. No foundation for them. We don't think they are material, anyway.

The Court: They may be received. We will disregard the apples.

The Clerk: Government's Exhibits 11 and 11-A in evidence.

(Said Receipts were received in evidence and marked Government's Exhibits 11 and 11-A.)

Q. (By Mr. Eubank): Now, Mr. Claus, I show you Government's Exhibits 11 [97] and 11-A in evidence, and ask you if you can determine by looking at these the amount you paid per pound for these Long dates?

(Testimony of Kenneth Claus.)

A. Well, as you see, it says One Case of 3-pound Dates. As near as I can remember, there was three pounds in the box. I don't remember how many boxes was in the case. I think there was 12, but I am not sure. And it was three pounds for each box, and it was six dollars for each box, and I sold the box for a dollar.

Q. What would that have been a box?

A. Three boxes in a pound, and one box cost 50 cents. It would be about 16 or 17 cents a pound, wouldn't it, the way I figured?

Q. That is in regard to Plaintiff's Exhibit 11. Now in regard to Plaintiff's, or, rather, Government's Exhibit 11-A, what did you pay a pound for that?

A. This one, this is just the same as that one. One case 3-pound dates, \$6.00. One case three-pound dates, \$6.00. They are the same, only different times, I guess.

Q. The purchase is covered by Government's Exhibits 11 and 11-A for what kind of dates?

A. As near as I can remember, they were Adeglisch-Norris.

Q. That is what company?

A. On these first ones here, I don't remember whether they had Long on or Glass Date Company. It seems one was [98] from Glass Date Company, and the others in the other kind of box were from Long's. I don't know for sure. Some of these may have been Long's. It has been two years. It is

(Testimony of Kenneth Claus.)

hard to remember what was written on the package, because I didn't have many of them.

Q. Could you tell which of these was Long dates?

A. I would say both of them were the same dates, because they were both purchased at the same time, because only maybe one or two times I got some of that kind. The other times they were in another kind of box. They weren't in a three-pound box. They were in the other box, which I think was a one-pound box.

Q. In your recollection, do you recall the type of date that was covered by these two receipts?

A. You mean the variety of date?

Q. The company name of the date?

A. No, that is what I just said, I don't remember whether or not it was the Long Date or Glass Date Company. It could have been either one, because I don't remember which one was on the particular box.

Q. This memorandum that we have in evidence as Government's Exhibit 10, you are certain that that was Long's dates?

A. Yes, because that is just like all the rest of these I have in my hand that was in that one-pound box. I assume it was a one-pound box, but it was that type of box, put it that [99] way, that is there.

Q. These ones you have in your hand, were those written by you?

A. Yes. I was supposed to bring all these, and this is the way I had them down, so that is the way

(Testimony of Kenneth Claus.)

I brought them. This is the date and the amounts as I had them in my bills.

Q. Does that represent a memorandum?

A. They represent what I paid for the dates at the time I bought them.

Q. These are your books?

A. I had them written down in my merchandise for resale. I put these in the box with my bills other than these. I got these figures out of my books. I had written in my books what I had purchased on these dates, and I wrote it down and brought it down like I was told to do.

Q. The group represented on December 13 and December 10, December 9, and December 16, those you will testify are Long dates? Is that correct, these three?

A. I will testify they were in that box there like that. I don't know whose dates they were. I bought them from the Acme Distributing Company. They was in them boxes. I don't know whose dates they were.

Q. This type of box?

A. That type of box, yes, sir.

Q. And it was this color? [100]

A. It was this color. This is the kind of packages most of them were in. One time I got some in a brown cardboard box. There was three pounds in a box. There was nothing on that, but most of them was like that. (Indicating.)

Mr. Eubank: I would like to have these marked for identification 12-A and B.

(Testimony of Kenneth Claus.)

The Clerk: Government's Exhibits 12, 12-A and 12-B for identification.

(Said Memos were marked as Government's Exhibits 12, 12-A and 12-B for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibits 12, 12-A and 12-B for identification, and ask you if those are the memos from your records? A. They are, sir.

Q. And these are in your writing; is that correct?

A. They are, sir. No; wait a minute. My wife wrote this down for me this morning out of my books, because she can write better than I can. These two are my writing, this is my wife's writing. I told her what to write. This is in my books, that date and that amount; yes, sir.

Mr. Eubank: I offer these in evidence.

Mr. Whitney: May I ask a question on voir dire?

The Court: Yes.

Q. (By Mr. Whitney): You keep books of account? [101] A. I beg your pardon?

Q. You keep books of account? Do you keep books for your business?

A. Yes, sir; I keep the books of my business; yes, sir.

Q. Where did you get these? Out of that box, you say?

A. I made them out myself and put them in my box with my other bills, sir.

Q. When did you make them up?

A. At the time I bought the dates.

(Testimony of Kenneth Claus.)

Q. At the time you bought the dates?

A. Yes, sir; all but that one.

Q. You didn't make that one up?

A. I took that one out of my books. I made that up this morning. That was a copy of what was in my books.

Q. Is this your handwriting?

A. That is my wife's handwriting.

Q. She took it out of the books?

A. No; I told her to write it down for me. She writes better than I do. She wrote it for me.

Q. This is in your handwriting?

A. Those two are my handwriting.

Mr. Whitney: I object to it as not the best evidence. Immaterial.

Mr. Eubank: I offer these in evidence as a memorandum, your Honor. [102]

The Court: I am a little confused. Are those the evidence of purchase of Long's dates or Glass dates?

Mr. Eubank: These were testified to as representing the Long date purchase.

The Court: All right, they may be received.

The Clerk: Government's Exhibits 12, 12-A and 12-B in evidence.

(Said Note Paper Memos were received in evidence and marked as Government's Exhibits 12, 12-A and 12-B.)

Q. (By Mr. Eubank): I show you Government's Exhibits 12, 12-A and 12-B in evidence, and

(Testimony of Kenneth Claus.)

ask you to tell the jury what type of dates these memos represent, what dates were purchased?

Mr. Whitney: If the Court pleases, I assume that this memo would show.

The Court: They are supposed to be Long dates, you just told me. What do you want to ask him about it again for?

Mr. Eubank: All right. It is in evidence now. I thought we would have him testify.

The Court: You just told me they show there as evidence of the purchase of Long dates. Why wear these things out?

Mr. Eubank: Okay.

Q. (By Mr. Eubank): Mr. Claus, in your business, what type of stand did you operate during the period that these receipts cover? [103]

A. I operate fruit and vegetable stands like you see along the street, where you sell oranges and grapefruits, and dates, and that type of merchandise.

Q. The particular dates that were covered here that were sold to you by Mr. Moffman, do you recall the price per pound that you paid for these dates?

A. Like I said, I believe it was approximately 12 cents, that is for these in these boxes, 12 cents per pound.

Q. And at another time, did you pay a different price than 12 cents?

A. Like I said, there were three pounds in one box, and that figured like about 16 cents. Three

(Testimony of Kenneth Claus.)

into fifty would be the difference. It was packed in a different type of box.

Q. The receipts we have there, you testify that the dates that you received were in those price ranges, is that correct?

A. Approximately, sir. That is pretty close.

Q. If you were to go to the extreme of the approximate, how far could it possibly be?

A. The ones I bought wouldn't vary maybe, say, from 11 to 13 cents. Otherwise I wouldn't have bought them, because I could buy them at the same price here, Arizona dates.

Q. Did you at any time telephone Mrs. Long, or the Long Date Company? A. I did. [104]

Q. And in regard to that call, did you attempt to contract for dates?

A. I wouldn't put it that way, sir.

Mr. Whitney: What difference does it make? That is completely outside of the indictment. I object to it as immaterial, what he did with Mrs. Long.

The Court: She said somebody called her, and it wasn't the defendant. Maybe it was this witness.

Q. (By Mr. Eubank): What, in the call to Mrs. Long, what arrangement did you attempt to make, if any?

A. Well, if I am allowed, I will tell you in my own words why I called, and what I called for. May I do that?

The Court: I don't know about that.

Mr. Whitney: Just answer the questions, sir.

The Court: Just a minute.



(Testimony of Kenneth Claus.)

The Witness: I am confused. I don't know what you mean.

Q. (By Mr. Eubank): First, did you make a call to Long's        A. I did, sir.

Q. Approximately when?

A. Well, as near as I can remember, I believe it was in December of 1954.

Q. And do you recall who you talked to? [105]

A. Well, the person to whom I talked said they were Mrs. Long.

Q. And did you ask about Long dates? What was the purpose of your call?

A. I asked her how much I could buy dates from her for. That was why I called her.

Q. Did you ask for cheap dates, or inexpensive dates?

A. I don't know as I mentioned cheap dates. I asked her the price if I bought a large amount of dates.

Q. What did she say?

A. She said she was getting 45 cents a pound, as near as I can remember.

Q. Did she say where she was getting 45 cents a pound?

A. I don't remember whether or not she said where she was getting that, but she said that was what she was getting, as near as I can remember.

Mr. Whitney: If the court please, that is wholly immaterial.

The Court: I think so. Disregard that. It may be stricken.

(Testimony of Kenneth Claus.)

Q. (By Mr. Eubank): Did she offer to sell you any dates?

A. I don't believe so, because we were arguing about the price.

Q. Did you make any statement as to the price of Long [106] dates?

The Court: I don't think this has anything to do with this lawsuit. I don't believe I would care to hear any more about it.

Q. (By Mr. Eubank): When you purchased these dates from Hoffman, did you have any conversation with Mr. Hoffman as to the place that he was procuring these dates from?

A. Well, other than he said they were California dates, I don't believe that I do. I mean, there may have been some conversation over a period of two years you could forget about. I think the main thing I asked about whether they were Arizona or California, and as near as I can remember, I think he told me they were California dates.

Q. When you placed your call into the Long Date Gardens, did you do that by finding the phone number on one of the boxes of dates, or did you inquire from the telephone company, if you recall?

A. Well, I don't remember how I went around getting that phone number. I do remember the name of the company was on there, so I could have, or it may have been stamped on the box. I don't remember how I got the number, but I got the name of the company off the box.

Q. The price you were buying dates for from

(Testimony of Kenneth Claus.)

Mr. Hoffman at that particular period, the market being what it was, was [107] that a good price for market conditions, or was it an average price in market conditions?

A. What do you mean by good, sir? Good for me or good for the seller?

Q. Good for you?

Mr. Whitney: I object to the question. He said he bought those dates, and he could have got them in Arizona for the same.

Mr. Eubank: All right, no further questions.

Cross-Examination

By Mr. La Prade:

Q. Mr. Claus, is this the same size box of dates that you were buying?

A. Sir, it looks like the same size.

Q. What were you selling them for per box?

A. Let's see now.

Q. Didn't you state one dollar?

A. No, sir; I said a box that had approximately three pounds in it was sold for one dollar by me.

Q. Do you recall what you were getting for this size box?

A. I believe I was selling those boxes there, five of them for a dollar, maybe in the end even six, but I know I sold a lot of them five of them boxes for a dollar.

Q. You say you could get the same quality of date for [108] what per pound here in Arizona?

(Testimony of Kenneth Claus.)

A. I have bought lots of dates in Arizona, and better quality than that, at 10 cents per pound.

Q. You could get them at that price here in Arizona at that time?

A. At that time I wasn't buying in Arizona, I was buying these. But I have bought a lot of them, and I have also bought a lot of California dates at 10 cents or better a pound of the same quality as that.

Q. All right, about the same time as we are discussing here?

A. Right about that time, when there wasn't any more of these.

Mr. La Prade: That is all.

Mr. Eubank: That is all.

(Witness excused.)

The Court: We will suspend until ten in the morning. Keep in mind the Court's admonition.

(Thereupon, an adjournment was taken to 10:00 o'clock a.m. the following day, September 19, 1956.) [109]

September 19, 1956, 10:00 A.M.

The Court: You may proceed.

Mr. Eubank: Mr. Whitney has consented to the release of Mrs. Darling.

The Court: All right, she may be excused.

Mr. Eubank: And we have other witnesses to be sworn.

(Witnesses sworn.)

The Court: You gentlemen will remain out of the courtroom until called.

Mr. Eubank: At this time, I would like to request that a witness be called out of order. This witness is Mr. T. L. Brice. He is supposed to be a key figure at a wholesale grocers' convention, and supposedly has a plane connection at 10:55. [110]

The Court: Better get him in here, then.

Mr. Eubank: Mr. Whitney, do you think we could move this man along fairly fast? He has to make a plane connection.

Mr. Whitney: That would depend a great deal on what he has to say.

Mr. Eubank: All right, I call Mr. T. L. Brice.

**T. L. BRICE**

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

**Direct Examination**

By Mr. Eubank:

Q. Your name is Ted L. Brice?

A. That is right.

Q. And you are employed by the T. L. Brice Company? A. That is right.

Q. In what capacity are you employed?

A. I am manager of it now.

Q. That is located in Sherman, Texas?

A. That is right.

Q. Do you recall the name of Ben B. Hoffman?

(Testimony of T. L. Brice.)

A. Yes, sir.

Q. Do you recall the name of Ben B. Hoffman Wholesale Grocers?      A. Yes, sir.

Q. Do you know the place where that firm was located? [111]

A. Located in Tucson, Arizona.

Q. In regard to that firm, did you have any telephone communication with them?

A. Yes, sir.

Q. Would you please explain first when that telephone call was had?

A. It was on or about May 25th of 1953.

Q. And how did that call identify itself?

A. As Mr. Ben B. Hoffman, as Ben B. Hoffman Wholesale Grocery.

Q. And was the town identified?

A. Yes, sir; it was.

Q. What was the nature of the call? Was it collect, or paid?      A. It was collect.

Q. What did Mr. Hoffman say?

Mr. Whitney: I object to it, if the Court please, on the grounds no foundation made for that, and no identification except his statement that he talked to Mr. Hoffman at Tucson.

May I ask him one question on voir dire?

The Court: All right.

Q. (By Mr. Whitney): Did you ever talk to Mr. Hoffman personally, except on the phone?

A. Just on the phone. [112]

The Court: Did he say it was Hoffman?

(Testimony of T. L. Brice.)

The Witness: Yes, sir.

The Court: Go ahead.

Q. (By Mr. Eubank): What did Mr. Hoffman say?

A. He wanted to know if he could buy some pickles, and wanted to know the price of the pickles and the delivery date of them.

Q. In regard to the pickles, what was the price that you quoted?

A. He bought several sizes which varied in price, the different sizes.

I remember one was quarts, and at that time I don't remember what the exact price was on them.

Q. What were the terms?

A. One per cent 10, net eleven.

Q. And what does that mean, for the benefit of the jury?

Mr. Whitney: I would like to have the answer to that last question.

The Witness: One per cent 10, net eleven.

That is to say, within ten days they get 1% cash discount off the invoice. If it isn't paid, the full amount of the invoice is due on the eleventh day.

Q. (By Mr. Eubank): Was this shipment based upon the phone call gotten [113] together by your firm? I mean, was it shipped? A. Yes, sir.

Q. Now, in the conversation with Ben, did you inquire into his business?

A. Yes, sir. Let me clarify this one moment. On the first phone call I did not. There were other

(Testimony of T. L. Brice.)

phone calls which we did inquire about his credit rating, and so forth.

Q. Approximately, these other phone calls, when were they made?

A. The shipment of pickles was made on or about the 8th of June, and it was between approximately the 25th, and the 8th of June, 1953.

Q. The other phone calls, what statements were made at that time by Mr. Hoffman?

A. We asked him in regard to his credit rating if he was listed in Dun and Bradstreet, which he was not.

We asked him to give us some references as to the people he was purchasing from at that time, which he referred to us Eastern Packers. And then we checked at Sherman on two food concerns that distribute their products in this area, if they had heard of Mr. Hoffman, and these people said that he might be the one that purchased James A. Dick Grocery Company, and I called Mr. Hoffman and asked him if he was the one that bought out the Dick Grocery Company, and he informed me he was at that time. [114]

Mr. Eubank: Mark this Government Exhibit 13 for identification.

The Clerk: Government's Exhibit 13 for identification.)

(Said invoice was marked as Government's Exhibit 13 for identification.)

Q. (By Mr. Eubank): I show you plaintiff's



(Testimony of T. L. Brice.)

Exhibit 13 for identification, and ask you if you recognize this document?      A. Yes, sir.

Q. How do you recognize the document?

A. This is the invoice that was mailed to Ben B. Hoffman. It was not mailed to Ben B. Hoffman, but it was taken by our truck driver on delivery of his merchandise.

Q. This particular document, could you explain to the jury the technique of your records in regard to a document of this type?

A. Well, this is the invoice which is mailed to a jobber after his pickles are delivered. Now, when our truck delivers pickles to a jobber, he carries a bill of lading, usually.

Now, in this case here, we also sent the invoice along with the bill of lading, because we did not have satisfactory credit rating, and our driver had instructions, if at all possible, to pick up the check. Which was impossible. I don't recall what the excuse Mr. Hoffman gave him from there, therefore, this is the copy that our driver carried with him out [115] here.

Mr. Eubank: I ask that Government's Exhibit 13 be admitted in evidence.

Mr. Whitney: I object to it on the grounds no proper foundation has been laid. It is hearsay.

The Court: It may be received.

(Said invoice was received in evidence and marked as Government's Exhibit 13.)

Q. (By Mr. Eubank): Now, Mr. Brice, refer-

(Testimony of T. L. Brice.)

ring again to Government's Exhibit 13 in evidence, will you tell the jury the amount of the shipment?

A. It was 775 cases, and approximately 2100. Here it is exactly, \$2,138.75. \$2,138.75.

Q. Now, was any part of that money ever collected? A. Yes, sir; \$400 of it was paid.

Q. How did you collect the \$400?

Mr. Whitney: If the Court please, I object to that as immaterial.

The Court: He may answer.

Q. (By Mr. Eubank): In other words, what did you do to collect \$400?

Mr. Whitney: Same objection.

The Court: Same ruling. [116]

Q. (By Mr. Eubank): Go ahead.

A. There were several phone calls requesting Mr. Hoffman to make payment of this invoice, and the one that got the results, the \$400, we told him to either send the money from the invoice, or we would turn it over to our attorney for collection, or pick up the merchandise.

Q. And what did he say to that?

A. He said a check would be in the mail that evening. He didn't say how much.

Q. And did you receive a check?

A. We received a check in a day or so for \$400.

Mr. Whitney: I object to that. It is not the best evidence. I move it be stricken. The check is the best evidence.

The Court: It may stand. He wouldn't have the

(Testimony of T. L. Brice.)

Mr. Eubank: May this be marked as Government's Exhibit 15 for identification?

The Clerk: Government's Exhibit 15 for identification.

(Said Bill of Lading was marked as Government's Exhibit 15 for identification.)

Q. (By Mr. Eubank): Mr. Brice, I show you Government's Exhibit 15 for identification, and ask you if you recognize this document?

A. Yes, sir.

Q. And how do you recognize that document?

A. This is our normal bill of lading that our drivers carry with them to have the buyer or the receiving clerk sign. It is our record that they have received the merchandise.

Q. Can you tell from this whether or not the merchandise was received?

A. Well, on this one, on this particular instance, the invoice and this item went together in order that we may see if we could collect the account at the same time. He signed the invoice instead of this.

Q. Who signed it?

A. Mr. Hoffman signed the invoice instead of this, which was satisfactory with the company.

Mr. Eubank: I ask that plaintiff's Exhibit 15 be admitted in evidence.

Mr. Whitney: May I ask a question on voir dire? [121]

The Court: All right.

Q. (By Mr. Whitney): Mr. Witness, referring

(Testimony of T. L. Brice.)

we called our attorney and placed the whole thing in his hands, told him if the check was not received in whatever time limit was given, I do not recall exactly what time limit, for him to proceed to prosecute him, to sue him on it.

Q. Did you bring with you, Mr. Brice, telephone toll [118] tickets?

A. Yes, sir; I have them in my briefcase.

Q. Will you get them, please?

A. Yes, sir. (Handing documents to counsel.)

Mr. Eubank: Will you mark this as Government's Exhibit 14 for identification.

The Clerk: Government's Exhibit 14 for identification.)

(Said Telephone Bills were marked as Government's Exhibit 14 for identification.)

Q. (By Mr. Eubank): Mr. Brice, I show you Government's Exhibit 14 for identification, and ask you what those documents are.

A. These are telephone bills.

Q. And how were they received?

A. They were received collect, and they show Tucson on here.

Q. What do these calls relate to that you say show Collect?

A. All deals, all phone calls from Mr. Hoffman to us in regard to his pickles, and then the Tucson that is prepaid are calls to him.

Q. And can you identify from these bills the calls that you received from Mr. Hoffman?

(Testimony of T. L. Brice.)

A. Yes, sir; I can. Here is one on the 24th of June, we called Mr. Hoffman in regard to his account.

On August 13th, we called Mr. Hoffman in regard to [119] his account. On the 2nd day of June, we called Mr. Hoffman in regard to his account.

Now, on the 25th of May, Mr. Hoffman called us.

Mr. Whitney: Wait a second here. You mean somebody called you who said he was Mr. Hoffman?

The Witness: That is right.

Mr. Whitney: That is right.

The Witness: It was on the 25th of May.

Q. (By Mr. Eubank): Was that the first call, to your knowledge?

A. That is right, the 25th of May. On June 18th, we called Mr. Hoffman in regard to his account.

Mr. Eubank: I ask that Plaintiff's Exhibit 14 be admitted in evidence.

Mr. Whitney: We object to this, first, on the grounds that the identification of the person calling has not been made.

And, second, on the grounds that as far as I can see from a cursory examination of this exhibit, there is none of these calls that fits the charge in Count XI of the Indictment, which sets the date as May 29th, 1953.

The Court: It may be received.

The Clerk: Government's Exhibit 14 in evidence.

(Said Telephone Bills were received in evidence and marked as Government's Exhibit 14.) [120]

(Testimony of T. L. Brice.)

check. It would go back to the man that made it. How would he have it?

Q. (By Mr. Eubank): Now, did you talk to Mr. Hoffman after receiving that payment?

A. Yes, sir. We had, I don't know if it was one or two, but we had at least one phone conversation with him after that.

Q. And what was the tenor of that phone conversation?

Mr. Whitney: Same objection, on the grounds that no [117] identity has been made yet.

The Court: All right, go ahead.

Mr. Eubank: You may answer.

The Witness: We were trying to get the balance of our account cleared up there, and we told him if it was not paid we would come out and pick up the merchandise and issue a credit for merchandise we picked up, and then he would owe the balance, if there would be any balance at that time.

Q. (By Mr. Eubank): And what did he say to that?

A. He said they were distributed over a several hundred mile area, and he couldn't pick them up there, and he would mail a check, I think that night, or very shortly, mail another check very shortly, and at that time we gave him so many hours to mail another check in, which did not come in.

Q. That check never came in?

A. That is right.

Q. Did you take any action after that?

A. As soon as we finished talking on the phone,

(Testimony of T. L. Brice.)

to Government's Exhibit 15 for identification, what are those rings around there? What do they mean?

A. That is usually the way—I will phrase it, instead of saying usually, that is one way a receiving clerk will check his merchandise off. As he takes it off the truck, he might figure it, he might check it.

Q. The same way with the marks, so many shorts, so many shorts?

A. Our driver has instructions to put that on there.

Q. And this was prepared by your driver?

A. This was prepared by our company at Sherman, and it is carried by our driver. This notation in regard to "shortage of 15 cases" is made by our driver when he unloads the merchandise.

Q. Hoffman had nothing to do with that exhibit?

A. No, sir.

Mr. Whitney: I object to it on the grounds it is improper identification. It is not binding on the defendant.

The Court: It may be received.

(Said Bill of Lading was received in evidence and marked as Government's Exhibit 15.) [122]

Q. (By Mr. Eubank): Your truck shipment, Mr. Brice, will you tell the route it was supposed to have taken?

A. It was a straight load of pickles to Tucson. Our drivers had the instruction to go the nearest route, which I believe would be through El Paso.

(Testimony of T. L. Brice.)

Further than that, their stops on the way I wouldn't know.

Q. And that was from where?

A. The plant in Sherman, Texas.

Q. In Sherman, Texas? A. That is right.

Mr. Eubank: No further questions.

### Cross-Examination

By Mr. La Prade:

Q. Mr. Brice, you are not personally acquainted with the defendant in this action, are you, sir?

A. I never have seen him before.

Q. You never have had any direct conversations with him? A. Just over the telephone.

Q. That was merely a representation that it was somebody by the name of Hoffman?

A. That is right.

Q. You don't know whether it was the defendant in this case or not, do you, sir?

A. No, sir.

Q. You don't know him by sight? [123]

A. No, sir.

Q. You don't actually know who you were talking to?

A. Just what I was told, just what they told me over the phone.

Q. You have no knowledge whether the shipment was ever personally received by Mr. Hoffman, other than what somebody else told you?



(Testimony of T. L. Brice.)

A. Other than his signature that you have in your hand.

Q. You don't know his signature when you see it, sir? A. No, sir, I don't.

Q. You wouldn't have the slightest idea?

A. Wait a minute. Backing up a little, I do have some correspondence from Mr. Hoffman with his signature on that. It could be compared with that.

Q. You didn't see the person write on the letter, however, did you, sir? A. No, sir.

Q. This was a credit transaction, wasn't it, Mr. Brice? A. That is right.

Q. And when you didn't collect it, when you couldn't collect it, you turned it over to whom?

A. To our attorney there in Sherman.

Q. And it was purely a civil matter, as far as you were concerned? A. That is right. [124]

Q. Just a matter of another account which had gone bad, as far as you were concerned, is that right? A. That is right.

Q. That was your only interest?

A. That is right.

Q. As a matter of fact, you made an attachment on some other merchandise, didn't you?

A. That is right.

Q. And received your payment in full?

A. We came out about even on it.

Q. After receiving the, I believe it was the \$400 payment? A. That is right.

Q. Was there any other merchandise ordered?

(Testimony of T. L. Brice.)

A. No, sir.

Q. And there was not any other shipped, was there?      A. No, sir.

Q. And the \$400 did not lull you into shipping any other merchandise, did it?

A. No, sir, it did not.

Q. This particular merchandise was ordered on what day, sir, do you recall?

A. On or about the 25th of May.

Q. 1953?      A. That is right. [125]

Q. And this is the shipping date on Government's Exhibit 13 in evidence?

A. It is on the right-hand side there.

Q. The shipping date would be June 4th?

A. That is right.

Q. A few days later?      A. That is right.

Q. And you received payment of the \$400 when, sir?

A. I would estimate about two weeks later.

Q. This is the only order you actually received?

A. That is right.

Q. And none other after you received the check, isn't that right?      A. Yes, sir.

Q. With reference to Government's Exhibit 14, Mr. Brice, I will ask you if this is the sum total of all the telephone statements you received for the time in question?      A. That is right.

Q. I will ask you to examine those telephone statements, referring to the month of May of 1953, and ask you if there appears thereon that you re-

(Testimony of T. L. Brice.)

ceived any phone calls from Arizona during the month of May?

A. Yes, sir, I got one here in the month of May, on the 25th day of May.

Q. That is the one you referred to on direct examination? [126] A. That is right.

Q. And that refers to the 25th day of May of 1953? A. That is right.

Q. And you did not receive one on the 29th day of May of 1953, did you?

A. It is not on here. No, sir, there isn't one on here for that date.

Mr. La Prade: At this time we move to have the Court review its ruling on Exhibit 14 in evidence, and have it stricken from the record, for the reason it has no connection with this case, and does not refer to any count in the Indictment.

The Court: All right. Motion denied.

Mr. La Prade: That is all.

### Redirect Examination

By Mr. Eubank:

Q. In relation to the letters, Mr. Brice, do you have letters received from Ben Hoffman?

A. Yes, sir, right here in my folder.

Q. In what connection were those letters received by you?

A. They were in connection with paying his account.

Q. Would you please remove those letters?

(Testimony of T. L. Brice.)

A. Yes (handing to counsel).

Q. Where is the original, Mr. Brice?

A. The original is in the lawyer's office in Tucson. [127]

Q. Do you have any of the original letters?

A. No, sir. He has the complete file on that.

Q. And all you have are these copies?

A. That is right.

Q. How were these copies made?

Mr. Whitney: I object to this as improper redirect.

The Court: It is not improper, but I don't think the letters are admissible, so you don't have to waste any more time.

Mr. Eubank: No further questions.

The Court: Is that all for this witness?

Mr. La Prade: That is all.

Mr. Eubank: May this witness be excused, Mr. Whitney?

Mr. Whitney: Yes, I will excuse this witness.

(Witness excused.)

Mr. Whitney: If the Court pleases——

The Court: You have stated your objection. I don't want to hear anything about that.

Mr. Whitney: I want to move to strike it.

The Court: Motion denied.

Mr. Whitney: The defendant moves to strike Government's Exhibit 14 in evidence on the grounds that the Indictment in Count XI charges the precise

date to be what it says, on or about the 29th of May, 1953.

The Court: You know that is close enough. It doesn't [128] have to be the exact date.

Mr. Whitney: In the mail fraud statute, the date has to be precise as to the gist of the offense.

The Court: All right, motion denied.

Mr. Eubank: At this time the Government would like to strike one of the counts of the Indictment, the Poletti Sausage count.

The Court: You want to dismiss that count?

Mr. Eubank: Yes.

The Court: Which one is it? What is the number?

Mr. Eubank: Number VI.

The Court: All right, that count will be dismissed.

Mr. Eubank: Mr. Poletti is having a heart operation in San Francisco, and couldn't appear.

The Court: All right.

Mr. Eubank: For our next witness, I will call Henry Leppla.

### HENRY LEPLA

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Mr. Henry Leppla?

A. Yes.

Q. That is spelled L-a-p-p-l-a?

(Testimony of Henry Leppla.)

A. L-e-p-p-l-a. [129]

Q. And you are the owner of the Mesa Transfer and Storage company? A. That is right.

Q. At 254 South Pomeroy in Mesa, Arizona?

A. Right.

Q. Mr. Leppla, how long have you been in the transfer business? A. Going on four years.

Q. How long have you been in possession of the Mesa Transfer and Storage?

A. Well, that is how long I have operated as Mesa Transfer and Storage.

Q. Do you recognize the name of Ben B. Hoffman? A. Yes, sir.

Q. Do you recognize the name of Acme Distributing Company? A. Yes.

Q. Do you see Mr. Hoffman in this room?

A. I sure do.

Q. Will you point him out to the jury?

A. In the brown suit back there.

Q. How do you know Mr. Hoffman?

A. Mr. Hoffman stored various items with me, starting late in 1953. I believe that was November of 1953, he stored various items there, and he had office space from us there approximately two months in April and May of 1954. [130]

Q. Now, on the office space, what did he pay you a month for that?

A. The first month was \$40, and the second month was supposed to have been \$30.

Q. Now, in regard to the office set-up, how was that located in your building?

(Testimony of Henry Leppla.)

A. Well, it was at that time an adjoining office, had an adjoining door, and also it had an entrance through the main portion of the warehouse.

Q. While he was in possession of that office, did you at certain intervals go into the office?

A. Well, when he was—yes, it was an adjoining office, and the door was open for a short time at first, and of course there was a louver between the doors, so I more or less could hear what went on.

Q. Will you tell the jury what type of fixtures were in the office?

A. There was, I think, two desks, and it was just a very small office.

Q. Were there any filing cabinets?

A. No, there didn't seem to be hardly anything in there.

Q. Was there a typewriter?

A. I don't believe he had a typewriter.

Q. Was there a telephone?

A. Yes, I had a telephone installed in there for him. [131]

Q. With regard to the office, were there any employees that worked for Mr. Hoffman?

A. No, not directly. We did deliver a few things for him that were stored.

Q. Did he have anyone working in the office for him?      A. No, not when he was there.

Q. Were there any books or records, to your knowledge, stored in the office?

A. Not a thing.

(Testimony of Henry Leppla.)

Q. How much time did Mr. Hoffman spend at this office?

A. Well, the first month when he was in the office, he was in there quite a little bit. I would say two or three hours during the day, sometimes, and later on, you might say the second month, he wasn't in there hardly at all.

Q. Did you ever overhear any conversations that Mr. Hoffman had?

A. Yes, due to the location of the office, it was a little hard not to.

Q. Did you ever hear any conversations had by Mr. Hoffman over the telephone?

A. Yes, I heard a good deal of them.

Q. Could you tell the nature of those calls?

A. Yes, they were all very much the same. I don't recall the companies that he was talking to, although the names were mentioned. [132]

Q. How was the call placed? Was it prepaid or collect?

A. It was almost always collect.

Q. And who were the general types of people he would call?

A. Well, wholesalers, usually, perhaps Los Angeles or San Francisco, or, in other words, it was a long ways off. It was always far across the country.

Q. You didn't hear him, to your knowledge, or to your recollection, you didn't hear him place any collect local calls?

A. No, not to my knowledge, locally.



(Testimony of Henry Leppla.)

Q. Now, was there a pattern to the information that he would give these people?

A. Yes, there was.

Q. What was the nature of that information?

A. Well, he would generally open up the conversation and say, "This is Ben Hoffman of the Acme Distributing Company."

And then he would say—of course, I wouldn't hear what was going on at the other end, and he would say, "What do you have today," in some specific line, and they would answer him, and he would ask the prices, and he would dicker a short time on the price. Then he would say, "Oh, send me a dozen cases of this, three dozen cases of that," what you might consider a medium sized order, not small.

And he would say, "Put that on regular terms," or something to that effect. And the conversation was generally [133] that, most every time he called, and it was usually Collect.

Q. Could you estimate how many times you overheard that type of conversation?

A. Well, a couple of dozen times. It was quite considerable.

Q. Back to the office, when he moved out of there, was there any paraphernalia left in the office?

A. Hardly anything. The only thing left in there was a Los Angeles yellow page telephone book.

Q. Did you ever see him using the telephone book, I mean that particular one you described?

(Testimony of Henry Leppla.)

A. I would say that he probably used it. I don't recall necessarily seeing him.

Q. In other words, your answer would be that you didn't?

A. I know he used it. I don't recall seeing him do it.

Q. While Mr. Hoffman was in occupation of the office space, did he have many business callers, that you know of, that you talked to?

A. Oh, very few, very few. He did have a few telephone calls. When he wasn't there, I told my secretary to give him the message, which we did a number of times.

Q. Were any inquiries made about Mr. Hoffman?

A. Well, yes, there were a few. The local bank.

Q. When you were negotiating with Mr. Hoffman, or he was negotiating with you for the office space, did he make any [134] statements concerning his operation, or what he intended to do?

A. Well, yes, he said he was the Acme Distributing Company, and that he sold to various people, and, of course, we had had his storage in there earlier, and at least we thought we knew the nature of his business.

He had some, oh, fruit cakes, and various mixed fruit packages that he shipped out prior to Christmas late in 1953.

Q. Did he relate any of his past business experience to you?           A. No.

Q. That you recall?           A. Not to speak of.  
Mr. Eubank: No further questions.

(Testimony of Henry Leppla.)

Cross-Examination

By Mr. La Prade:

Q. Did you own the building? A. Yes.

Q. You rented the quarters to Mr. Hoffman?

A. Yes, I did.

Q. And it had some furniture in it when you rented it to him?

A. Oh, yes, we store furniture, mostly.

Q. That is the furniture he would use?

A. When you say furniture, I thought you meant customers' furniture. [135]

Q. You rented an office, and it had some furniture in it? A. Yes, it had two wooden desks.

Q. That is what he used when he was in possession of the premises?

A. Yes, approximately two wooden desks.

Q. How did it happen you were listening in on his phone conversations? You had adjacent offices?

A. Yes. Mr. Hoffman has a very loud and clear voice, and there is a louver in the door that we have for heating and cooling purposes. We did try to give him as much privacy as possible, but you couldn't help overhear his voice.

Q. Did you make some shipments for him locally?

A. Yes, we made some shipments for him locally.

Q. To different merchants locally?

A. Yes, I have a record here of all our transactions.

(Testimony of Henry Leppla.)

Q. And you could tell from having made deliveries for him, and having overheard these conversations, that he was in business?

A. Oh, yes, I knew he was in business.

Mr. La Prade: That is all.

### Redirect Examination

By Mr. Eubank:

Q. Mr. Leppla, did you say you had your company records of the shipments you made for Mr. Hoffman?

A. Yes, I have all records of all transactions with [136] Mr. Hoffman, as Acme Distributing Company, right here.

Q. And you also have copies of receipts of the payments that he made for rent?

A. Yes, mostly my receipts. They were mostly in cash, and so forth.

Q. And your company records, are those the records of your company in relation to those?

A. Yes, I copied these directly off of our original invoices, and these are definitely the records of our company.

Q. When did you copy those off?

A. My wife copied them here just a few days ago.

Mr. Whitney: What was that last answer?

The Witness: My wife copied them just a few days ago before I came into court, and to my knowledge they are correct. They look correct.

(Testimony of Henry Leppla.)

Q. (By Mr. Eubank): Did you compare the original entries with this?

A. Yes, these are from our original tickets.

Q. And they constitute a more or less memorandum, they are more or less a memorandum of the transaction?

A. Yes, more or less a recap.

Mr. La Prade: If the court please, that is not——

The Court: Don't waste any more time with that, because they aren't admissible.

Mr. Eubank: No further questions. [137]

The Court: That will be all.

Mr. Eubank: May this witness be excused?

Mr. Whitney: Yes.

The Court: Yes.

(Witness excused.)

Mr. Eubank: I call Mr. Herman Crede.

### HERMAN CREDE

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Herman Crede?

A. Right.

Q. That is C-r-e-d-e? A. That is right.

Q. And you are the vice president of C. A. Glass Company?

A. Yes, sir.

Q. And your offices are located at 735 East

(Testimony of Herman Crede.)

Fourth Street?           A. Yes, sir.

Q. In Los Angeles, California?

A. Yes, sir.

Q. And you are the packers and distributors of a type of date?           A. Yes.

Q. Would you tell the jury the name of the date? [138]           A. Gold Cup brand.

Mr. Eubank: Mark this as Government's Exhibit 16 for identification.

The Clerk: Government's Exhibit 16 for identification.

Mr. Eubank: And this as Government's Exhibit 17 for identification.

The Clerk: Government's Exhibit 17 for identification.

(Said packages of dates were marked as Government's Exhibits 16 and 17, respectively, for identification.)

Q. (By Mr. Eubank): Mr. Crede, I show you Government's Exhibits 16 and 17 for identification, and ask you if you recognize these boxes?

A. Yes, I do. They are ours.

Q. In reference to Government's Exhibit 16, will you tell how you recognize that as yours?

A. We have this brand. This is our exclusive brand.

Q. What above the cover of it?

A. Yes, this is our package.

Q. Now, about Government's Exhibit 17 for identification, how do you identify that?

(Testimony of Herman Crede.)

A. This is our package. This is our brand, and our package which was packed at that time.

Mr. Eubank: I offer Government's 16 and 17 in evidence.

Mr. Whitney: We object on the grounds no foundation made for introduction. [139]

The Court: No, there isn't.

Mr. Eubank: These will be connected up later.

The Court: All right, when they are connected up, they will be received.

Q. (By Mr. Eubank): Now, Mr. Crede, do you recognize the name of Acme Distributing Company?

A. Yes, sir.

Q. Do you recognize the name of Ben B. Hoffman? A. Yes, sir.

Q. And in what particulars do you recognize the names?

A. The merchandise was shipped under Acme Distributing.

Q. What merchandise?

A. The dates that were shipped.

Q. In regard to the shipments made, how was the contract formulated? Was it by actually talking to the person that was Acme Distributing Company? A. Yes, sir.

Q. How did that take place?

A. On a collect telephone call.

Mr. Whitney: Wait a minute. With you?

The Witness: The first call was with John Glass, and the other five were with me.

Q. (By Mr. Eubank): With relation to the calls

(Testimony of Herman Crede.)

to Mr. Glass, was there a [140] shipment made in regard to that call?

Mr. Whitney: I object to that as hearsay as to the defendant.

The Court: He would know whether there was a shipment made.

The Witness: The first call was taken by Mr. John Glass, who took the order, and gave it to me, wrote it on a piece of paper. I take charge of all the shipments, and he gave me the slip and said, "Ship this to Acme Distributing Company," which we did, which I saw that it was taken care of.

Q. (By Mr. Eubank): On this first shipment, do you recall approximately when that was made?

A. Well, I have the ledger sheet here. I could tell here. I have some memos here.

Mr. Eubank: Would you mark this as Government's Exhibit 18 for identification?

The Clerk: Government's Exhibit 18 for identification.

(Said Ledger Sheet was marked as Government's Exhibit 18 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 18 for identification and ask you if you recognize this sheet?

A. Yes, it is in my writing. [141]

Q. What does the sheet represent?

A. Well, on October 11th, there was a shipment made——

Q. I mean the document itself.



(Testimony of Herman Crede.)

A. This is our Accounts Receivable Sheet.

Q. And that comes out of what book?

A. Out of our Accounts Receivable Ledger.

Q. When are those accounts entered on this sheet?

A. Generally on the day the sale is made, our postings are made daily.

Q. With regard to this particular sheet, was that the case, to your knowledge?

A. Yes, I would say all the postings on this sheet were made on the day this was made.

Mr. La Prade: May I ask a question on voir dire?

The Court: Go ahead.

Q. (By Mr. La Prade): Was this particular piece of paper just a copy of what you had in your Ledger Sheets? A. It is the original record.

The Court: He just said it was the original.

Mr. La Prade: I didn't hear him.

Mr. Eubank: I offer Government's Exhibit 18 in evidence.

Mr. Whitney: I would like to ask a question on voir dire.

The Court: We will have our morning recess at this time.

(The morning recess was had.) [142]

The Court: You may continue.

Mr. Whitney: I have a question on voir dire.

The Court: All right.

Q. (By Mr. Whitney): Mr. Witness, referring

(Testimony of Herman Crede.)

to Government's Exhibit 18 for identification, these items of October 11, 1954, for two ninety-one, who was that phone call to, if you know? That was not to you, was it?       A. That was to John Glass.

Mr. Whitney: If the Court pleases, we object to this upon the grounds that no proper foundation is laid for its identification. It is hearsay, and not binding on the defendant for this reason. The Bill of Particulars in which we ask them to state the names of the persons he talked to names in this count John L. Glass. If you will refer to page two of the Bill of Particulars; so that there is no proper identification, and no foundation at all laid for that exhibit.

The Court: There was only one call, evidently. That is all you had in mind when you gave him the Bill of Particulars, that was the call to Mr. Glass? How is the other admissible?

Mr. Eubank: The other is admissible, sir, to show the circumstances that the dates were shipped, and in due course of business this gentleman here, as the vice president of the company, can testify as to the terms and succeeding telephone calls with Acme Distributing Company and Ben Hoffman. [143]

The Court: That is what you say. Now, what is your authority for that? You say here, "included also food and food products ordered by the defendant, and the names of the persons who received the telephonic communication."

Mr. Eubank: Is that in the Bill of Particulars?

(Testimony of Herman Crede.)

The Court: Yes. You are bound by your Bill of Particulars.

Mr. Eubank: That is correct, sir.

The Court: No question about that. So you probably would be confined to that one call to Mr. Glass.

Mr. Eubank: Confined to proving that one call?

The Court: Yes, which he has testified to.

Mr. Eubank: Can we prove by circumstantial evidence that the shipments did occur?

The Court: You might be able to show what was shipped. I don't know. I will let you do that. Go ahead.

But no telephone communication evidence other than Mr. Glass.

Mr. Eubank: Can we put in evidence the bills paid by the company?

The Court: I will let you show what was shipped to Mr. Hoffman.

Mr. Eubank: What was shipped. All right, sir. Then we offer Government's Exhibit 18 for identification into evidence.

Mr. Whitney: I object to it on the grounds there is no [144] foundation laid for it, hearsay, not binding on the defendant, fails to meet the Bill of Particulars.

The Court: Is that one of the records of your company that was kept in the regular order of business?

The Witness: Yes, sir.

(Testimony of Herman Crede.)

The Court: It is the regular order of business to keep these?

The Witness: Yes, sir.

The Court: All right, it may be received.

The Clerk: Government's Exhibit 18 in evidence.

(Said Accounts Receivable Ledger Sheet was received in evidence and marked as Government's Exhibit 18.)

Q. (By Mr. Eubank): I show you Government's Exhibit 18 in evidence and ask you, referring to that, can you tell the shipments that were made to the Acme Distributing Company, and the amounts of the charges made?

A. Yes, each one of these dates has the bill number, the type of dates, the quantity that was shipped, the amount of the invoice.

Q. When was the first shipment made?

A. October 11th, 1954.

Q. When was the last shipment?

A. November 16th.

Q. How many shipments were made in between the 11th and [145] November 16th? A. Five.

Q. What was the total balance due before any payment was made? A. \$1,146.40.

Q. Then a payment was received, is that correct? A. Yes, sir.

Q. What was the amount of that payment?

A. \$200.

Q. Was there a shipment, or subsequent shipments to the payment by Mr. Hoffman of the \$200?

(Testimony of Herman Crede.)

A. Yes, there were three shipments made after the payment was received.

Q. Now, in regard to the payment, did you receive the payments yourself?      A. Yes, sir.

Q. Did you order the subsequent shipments to be made?      A. Yes.

Mr. Eubank: Would you mark this as Exhibit 19 for identification?

The Clerk: Government's Exhibit 19 for identification.

(Said invoices were marked as Government's Exhibit 19 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 19 for identification, [146] and ask you if you recognize these documents.

A. Yes, sir. All but one in my handwriting.

Q. What are those documents?

A. These are invoices.

Q. How are invoices used in your company?

A. Well, everything that is shipped is billed on this invoice. These invoices here are all made to Acme Distributing. They were delivered to Watson Brothers Transportation for delivery on to Acme Distributing at 818 Apache Blvd., in Tempe, Arizona.

Q. And where are these kept in the records of your company?      A. In our files.

Q. And are these the originals, or copies?

A. These are the originals.

Q. What happens to the copies?

(Testimony of Herman Crede.)

A. Well, we have a tissue copy which we keep in numerical order, and the copy goes with the shipment.

Q. And that would have gone to——

A. Gone to Watson Brothers Transportation.

Mr. Eubank: I ask that Government's Exhibit 19 for identification be admitted in evidence.

Mr. Whitney: Same objection as to 18, if the Court please.

The Court: All right, same ruling.

Mr. Whitney: There is no foundation for this under the [147] charging indictment, or under the Bill of Particulars.

The Court: All right, it may be received.

(Said Invoices were received in evidence and marked as Government's Exhibit 19.)

Mr. Eubank: May I clarify one point, your Honor. Can this gentleman testify to the conversations he had with Ben Hoffman?

The Court: Over the telephone?

Mr. Eubank: Yes, sir.

The Court: You didn't recite that in your Bill of Particulars.

Mr. Eubank: All right.

The Court: That is what they wanted you to show, and you didn't do it.

Q. (By Mr. Eubank): Mr. Crede, Government's Exhibit 18 in evidence shows that \$200 was received on November 2nd——

(Testimony of Herman Crede.)

Mr. Whitney: If the Court please, the exhibit is in evidence and speaks for itself.

The Court: All right, go ahead.

Q. (By Mr. Eubank): —and a shipment was made on November 2nd. Is there any reason for that?

A. Well, the man made a payment on account, and ordered merchandise. He was slow in his payments, but over the phone [148] it was stated that his accounts were slow in coming in.

Mr. Whitney: I object to the phone business, unless it is telling who he spoke to.

The Witness: I spoke to Mr. Hoffman.

The Court: Forget about the telephone.

The Witness: There he is right there (indicating).

The Court: He doesn't have to testify about that.

Mr. Eubank: Just about the shipment.

The Witness: The shipment was made in good faith, that he had made a payment on account. We assumed that he was honest.

Mr. La Prade: Your Honor, may that be stricken from the record?

The Court: Yes.

Q. (By Mr. Eubank): The last shipment was made on the 16th of November. Do you know the reason why no subsequent shipments were made?

A. Each time I talked to him, he advised me that payment was in the mail. He talked to someone in his office.

(Testimony of Herman Crede.)

Q. Continue.

A. In other words, he was talking to someone in the office, like there had been an oversight, that the check had gone out.

Q. After November 16th, was there any other factor of why no more shipments were made?

A. We called, and there was nothing there. He was gone. [149]

Mr. Eubank: If the Court please, may this witness stand aside so we can identify the payment of the \$200?

The Court: All right. That will be all for the moment.

(Witness withdrawn.)

### GERALD HARDING

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Gerald Harding?

A. Right.

Q. And you are the Chief Clerk of the First Phoenix Branch of the First National Bank of Arizona?      A. Yes.

Q. And that is what street, what is the street location?

A. Our post office address is One East Washington.

Q. You are here under a subpoena duces tecum,



(Testimony of Gerald Harding.)

is that correct?           A. Yes, I believe. Yes.

Q. Did you bring the documents that we subpoenaed you for?           A. Yes.

Mr. Eubank: Would you mark this as Plaintiff's Exhibits 20 and 21, for identification.

The Clerk: Government's Exhibits 20 and 21 for identification.

The Clerk: Government's Exhibits 20 and 21 for identification.

(Said Bank Money Orders were marked as Government's Exhibits 20 and 21 for identification.) [150]

Q. (By Mr. Eubank): Would you tell the Court your Bank's procedure on issuing bank money orders?

A. We have an application, we issue the money order for the application.

Q. And the person comes up to the booth, and what happens then?

A. If you were a customer to come to the bank to purchase the money order, you would go to our collection department and state you wanted a money order payable to a certain party for a certain sum. We would fill out the application for you, sign it, make up the money order, accept the payment, keep the application, and give the money order to the purchaser.

Q. I show you Government's Exhibit 21 for identification, and ask you if you recognize that document?           A. Yes.

(Testimony of Gerald Harding.)

Q. How do you recognize the document?

A. Because I secured it from the bank records this morning.

Q. How are those kept in your bank?

A. These applications are kept daily, by year.

Q. How long are they kept, approximately?

A. Just offhand, I don't know offhand, but I would say five years for these applications.

Q. Now, this particular application, is that signed by [151] the person that purchased the money order? A. No, it is not.

Q. In that case, is it?

A. In this case, I don't know this signature here, but just looking at it, I think that one of our bank officers purchased it. I am not sure. I can't identify it.

Q. I show you Government's Exhibit for identification Number 20, and ask you if you recognize that document?

A. Yes, I recognize this one, too.

Q. What is the document?

A. This is a bank money order.

Q. In what bank?

A. It is on our branch.

Q. How are these cancelled money orders kept by your bank?

A. These are kept by this number here, numerically, by this number.

Q. How long are they kept?

A. These are kept indefinitely. I don't believe they are ever destroyed.

(Testimony of Gerald Harding.)

Q. This is the item, is that issued on the basis of this?

A. Yes, this on the order of that. That application was made, and this money order backs that application.

Mr. Eubank: I ask that Government's Exhibits 20 and 21 be admitted in evidence.

Mr. Whitney: If the Court please, the only objection I [152] have to this is that there is no foundation laid for the introduction.

The Court: I don't even know what it is. Let me see it.

Mr. La Prade: In addition, we will object to its introduction, because they have not been identified as having been purchased by the defendant.

Mr. Eubank: We will be able to prove, I believe, that they came——

The Court: If you want to prove that this is the defendant's signature on here, you can do that later.

Mr. Eubank: That is right, sir.

The Court: I will sustain the objection at this time. I don't know who signed it. Nobody knows who signed it.

Mr. Eubank: May it be admitted on condition it is connected up?

The Court: No, it will be received when you show it is his signature.

Mr. Eubank: All right, sir. No further questions.

(Testimony of Gerald Harding.)

The Court: Are you familiar with the defendant's signature?

The Witness: No, not at this time, I am not, sir.

Mr. Eubank: May this witness be excused permanently?

Mr. Whitney: I think so.

The Court: That is all.

(Witness excused.)

Mr. Eubank: At this time, I recall Herman Crede to the stand. [153]

### HERMAN CREDE

resumed the stand and testified further as follows:

#### Direct Examination

(Continued)

By Mr. Eubank:

Q. Mr. Crede, I show you Government's Exhibit 20 for identification, and ask you if you recognize that document?      A. Yes, sir.

Q. What is the document?

A. This is a bank money order for \$200.

Mr. Whitney: Wait a minute. It is a money order.

Q. (By Mr. Eubank): How do you recognize the document?      A. What do you mean by that?

Q. There must be something on this instrument that you are able to recognize it by.

A. On the back it is stated: "Pay to the order

(Testimony of Herman Crede.)

of California Bank, C. A. Glass Company, C. A. Glass Company, Incorporated.”

Q. That is your stamp?

A. That is our stamp.

Q. Did you put the stamp on that particular check?      A. Yes, sir.

Mr. Eubank: At this time I will offer Government's Exhibit 20 in evidence. [154]

Mr. Whitney: There is still no evidence, if the Court please, to connect that up.

Mr. Eubank: To show the payment.

The Court: That document may be received, but not the application, without further proof.

The Clerk: Government's Exhibit 20 in evidence.

(Said Bank Money Order was received in evidence and marked as Government's Exhibit 20.)

Q. (By Mr. Eubank): Now, in regard to Government's Exhibit 20 in evidence, Mr. Crede, is this the entry that you made on November 2nd?

A. Yes, sir; that is the payment that was received.

Q. Also, is this the only payment that you received in regard to this account sheet?

A. Yes, sir.

Mr. Eubank: No further questions.

(Testimony of Herman Crede.)

Cross-Examination

By Mr. Whitney:

Q. Mr. Witness, all of these items on Government's Exhibit 18 are dates, aren't they?

A. Yes, all dates.

Q. Pardon?

A. All dates, or date confection.

Q. And this was sold in the ordinary course of the Glass Company business? [155]

A. Yes, sir.

Q. On credit?           A. Yes, sir.

Q. And you were not paid?

A. We were not paid in full.

Q. I see. When did you cease doing business with the Acme Distributing Company?

A. After the date of the last invoice.

Q. Pardon me?

A. After the date of the last invoice on that ledger card.

Q. And that would be on November 16th?

A. If that is the date of the last invoice.

Q. 1954, is that right?           A. Yes.

Q. And you never tried to sell him anything after that?           A. No, sir.

Q. Pardon?

A. We never tried to sell him. He tried to buy from us.

(Testimony of Herman Crede.)

Q. In other words, you never at any time asked for other orders from Mr. Hoffman?

A. No, sir.

Mr. Whitney: May this be marked for identification?

The Clerk: Defendant's Exhibit A for identification.

(Said letter was marked as Defendant's Exhibit A for identification.) [156]

Q. (By Mr. Whitney): How long, Mr. Witness, have you been with C. A. Glass Company?

A. Since 1931.

Q. I see. Of course, you are well acquainted with Mr. Glass?

A. Yes. This is Mr. C. A. Glass' son.

Q. And you know his signature? A. Yes.

Q. Is that the signature of Mr. Glass?

A. It doesn't look like it.

Q. Is that Mr. C. A. Glass & Company's letter-head? A. Yes, sir. I can explain that letter.

Q. I understand. That isn't the question. Is that Mr. Glass' signature?

A. No, it doesn't look like it.

Q. Does it look anywhere like it?

A. No, it doesn't. He never writes down. It is capital J.

Q. Have you got any signatures of Mr. Glass with you? A. No, I haven't.

Q. Was that sent out by the C. A. Glass, Inc.?

A. Yes. I remember this letter.

(Testimony of Herman Crede.)

Q. And did you sign it for Mr. Glass?

A. No, it is not my signature. [157]

Q. Was it sent with Mr. Glass' knowledge?

A. Yes.

Mr. Whitney: We offer it.

Mr. Eubank: We have no objection, your Honor.

The Court: It may be received.

The Clerk: Defendant's Exhibit A in evidence.

(Said letter was received in evidence and marked as Defendant's Exhibit A.)

Mr. Whitney: If the Court please, I will read this to the jury.

(Thereupon, Defendant's Exhibit A in evidence was read to the jury by Mr. Whitney.)

Q. (By Mr. Whitney): As I understood it, you didn't know of your own personal knowledge about the first phone call that you mentioned of October 11, 1954. Was that with you?

A. You are speaking of the first phone call?

Q. Well, the phone call on October 11th, 1954, was there a phone call on or about that time?

A. Is that the date of the first shipment?

Q. Pardon?

A. Is that the date of the first shipment?

Q. You have no personal knowledge of that?

A. Not the exact date. I'll tell you. Yes, October 11th.

Q. Would it help you by referring to Govern-



(Testimony of Herman Crede.)

ment's Exhibit [158] 18 in evidence, the bill for these dates and date products?

A. Yes, on October 11, we received a phone call. My office is there, his is there (indicating). I heard him talk to him. I heard him give him the dope for the shipment.

Q. You didn't talk to him yourself?

A. I couldn't swear to it, but I answered the call myself, and the call was for Mr. John Glass.

Q. And you put Mr. Glass on the phone?

A. That is right.

Q. But you don't know anything about who was on the other end of the phone except from what was said, is that right?

A. Except he gave me an order after the phone call for the Acme Distributing Company.

Mr. Whitney: I move to strike all the exhibits, and I move to strike all the evidence with reference to this gentleman, and the exhibits, on the grounds that it doesn't meet the indictment or the Bill of Particulars.

The Court: Motion denied: Is that all from this witness?

### Redirect Examination

By Mr. Eubank:

Q. Mr. Crede, were there any other Gold Cup dates in Phoenix at the time that these shipments were made?

Mr. La Prade: That is improper redirect. I object to it. [159]

(Testimony of Herman Crede.)

The Court: Oh, go ahead.

The Witness: That would be hard to say. I don't believe so. We sell to quite a few people, truckers, and so forth. I don't know if any were distributed in the area or not. I doubt it very much.

Q. (By Mr. Eubank): You can't testify?

A. No.

Q. Were any shipments made to Phoenix docks to your knowledge? A. Not that I recall.

Q. In regard to the letter, defendant's Exhibit A, do you have any explanation of this letter that was addressed to Acme Distributing Company?

A. Yes, I do. This was sent out in order to try and get a line upon him. We were hoping he would acknowledge it, because there was no answer to the telephone calls at this address. We were hoping there was some forwarding, or some means we could get in touch with him, at which time we intended to send our collector.

Q. Did he answer this particular letter?

A. Nothing.

Mr. Eubank: No further questions.

### Recross-Examination

By Mr. Whitney:

Q. In other words, it was just a trap, and you were trying to collect?

A. A trap to catch a crook.

Mr. Whitney: That is all.

The Court: Is that all from this witness?

Mr. Eubank: No further questions.

(Witness excused.)

Mr. Eubank: I call Duncan McRuer.

DUNCAN McRUER

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is Duncan McRuer?

A. That is right.

Q. And you are manager of Watson Brothers  
Trucking Company here in Phoenix?

A. Yes, Watson Brothers Transportation.

Q. And you testified yesterday to Long's dates,  
is that correct? A. That is right.

Q. I would like to show you an exhibit put in  
at that time, Government's Exhibits 8 through 18.

Mr. McRuer, you were subpoenaed to bring with  
you [161] records in regard to shipments received  
on your dock from C. A. Glass Company in Los  
Angeles, California, is that correct?

A. That is correct.

Q. And I show you Government's Exhibits 8,  
3-A, 8-B, 8-C, 8-D, 8-I, 8-R, and ask if you recog-  
nize them.

A. Yes, those are Watson Brothers freight bills  
covering shipments from the C. A. Glass Company  
of Los Angeles, to the Acme Distributing Company  
of Tempe, Arizona.

(Testimony of Duncan McRuer.)

Q. Will you look at each of those and see if each of those are all of that same type? Take 8, first.

A. 8 is a shipment. 8-A, 8-B, 8-C, 8-D, 8-1, 8-R. I might mention here 8-R is shown as shipped from the California Dates & Vegetable Company, which I understand is the shipping name of the C. A. Glass Company.

Q. All right. You testified to the course in which the records are kept by your company. Would you just refresh the minds of the jury as to just what the document is, and how your company keeps those, how you keep it in your office?

A. Three copies of a bill of lading are issued at the time the shipment is picked up, and the shipper gets two copies, the original and the memorandum, and the trucking company gets the middle copy, called the Shipping Order.

The shipping Order goes with the truck driver back to our office, where we type off the information shown, such [162] as the shipper, who it goes to, the weight, the number of pieces, and so forth, and that bill of lading goes into our file, and this freight bill goes with the truck that hauls the shipment from Phoenix, six copies.

Q. Are these copies kept in your office?

A. These are delivered to the customer, and he is required to sign three copies, one for Omaha General Office, one for the Phoenix Office, and one for us to return to him when we bill him for the

(Testimony of Duncan McRuer.)

freight, to show his accounting department it has been delivered out the back door.

Mr. Eubank: I ask that Government's Exhibits 8-A, B, C, D, I, and R be admitted in evidence.

Mr. Whitney: The only objection is no foundation laid, and not binding on the defendant, in view of the testimony of the gentleman in connection with the Glass Company who has just testified, and not meeting any count here of the indictment.

The Court: Objection overruled. They may be received.

The Clerk: Government's Exhibits 8, 8-A, 8-B, 8-C, 8-D, 8-I, and 8-R in evidence.

(Said Freight Bills were received in evidence and marked as Government's Exhibits 8, 8-A, 8-B, 8-C, 8-D, 8-I and 8-R.)

Q. (By Mr. Eubanks): Now, Mr. McRuer, I show you the exhibits that the [163] clerk has just named as Government's Exhibits 8, and 8-A, through R in this case, in evidence, and ask you if you can recognize who the receiver of that shipment is?

A. I believe that that is the signature of Ben Hoffman, Acme Distributing Company, per Ben Hoffman.

Q. I believe you identified Mr. Hoffman yesterday, is that correct?

A. Yes, I have known Mr. Hoffman for approximately six years.

Q. And you recognize his signature?

(Testimony of Duncan McRuer.)

A. I recognize his signature. In certain cases, I personally saw him sign the freight bills.

Q. Will you go through them there? We will enunciate the number of each exhibit, and you tell me if that was signed by Ben Hoffman.

Government's Exhibit in evidence 8.

A. No. 8, Exhibit 8 is signed——

Mr. Whitney: If the Court please, the exhibits speak for themselves. They are in evidence.

The Court: His signature doesn't speak for itself. They have to prove the signature, unless you want to admit it. Do you want to? Do you want to admit that that is the defendant's signature?

Mr. Whitney: May I ask a question on voir dire?

The Court: Right now. [164]

Mr. Whitney: If the Court please, I move to strike it.

The Court: Go ahead.

The Witness: 8 is signed by Acme Distributing Company, per Ben Hoffman.

Q. (By Mr. Eubank): That is his signature?

A. Yes.

Q. And 8-A?

A. 8-A is signed by Acme Distributing Company, per Ben Hoffman.

Q. That is his signature?

A. That is his signature.

Q. And 8-B?

A. 8-B is signed by Acme Distributing Company, per B. H., and the large "B. H." is characteristic of his signature.

(Testimony of Duncan McRuer.)

Knowing Mr. Hoffman, we insisted on his signing Acme Distributing Company per him personally, and this is a slipup, when he got away with just signing "B. H."

Q. Now, 8-C?

A. 8-C, Acme Distributing Company, per B. Hoffman. 8-D, Acme Distributing Company, per "B. H."

Q. Is that his, that is his signature?

A. That is his signature, the large "B. H."

Q. And 8-I? [165]

A. 8-I, Acme Distributing Company, per Ben Hoffman. That is his signature.

Acme Distributing Company, per Ben Hoffman. This is the only signature that isn't completely characteristic of the other signatures. I believe that is his signature, but it is a little bit smaller than usual.

Q. 8-R, you wouldn't testify definitely was his signature?

A. No, I couldn't say for sure that is Ben Hoffman's signature.

Q. In all of the exhibits we have enunciated, except 8-R, you would say they were Ben Hoffman's signature?

A. Very definitely.

Mr. Eubank: No further questions.

Mr. Whitney: That is all.

Mr. Eubank: May this witness be excused?

Mr. Whitney: Oh, yes.

(Witness excused.)

Mr. Eubank: I call Mr. Floyd Bishop.

FLOYD BISHOP

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is Floyd Bishop? [166]

A. Yes.

Q. And you have operated the B & B Fruit  
Stand? A. Yes.

Q. That is located at 1251 Apache Boulevard?

A. It is not now. It was at the time.

Q. What is the present location?

A. 4519 East Van Buren.

Q. Where is the location of that? Is that in the  
city of Phoenix?

A. Phoenix, yes, outside the city limits.

Q. Back in late 1954, where was your stand lo-  
cated? A. At Tempe.

Q. Tempe, in the city? A. Yes.

Q. Do you recognize the name of Ben Hoffman?

A. Yes.

Q. Do you recognize the name Acme Distribut-  
ing Company? A. Yes, sir.

Q. Do you see Mr. Hoffman in this room?

A. Yes.

Q. Would you point him out to the jury, please?

A. It is the man back in the back with the brown  
coat on (indicating).



(Testimony of Floyd Bishop.)

Q. Do you recall where you first met Mr. Hoffman?

A. He come to my stand to sell dates. [167]

Q. Approximately when?

A. You mean what month?

Q. Yes. A. I think it was in November.

Q. Of what year? A. 1954.

Q. Do you recall the brand name of those dates?

A. Gold Cup and Long's.

Q. I show you Government's Exhibit 6 in evidence, and Government's Exhibits 16 and 17 for identification, and I ask you if you recognize these cartons? A. Yes, I recognize all of them.

Q. Do you recognize this carton? A. Yes.

Q. Is that a type of date that you bought from Mr. Hoffman? A. Yes.

Q. That is Government's Exhibit 6 in evidence. I show you Government's Exhibit 16 for identification. Do you recognize that carton?

A. Yes.

Q. Is that of a type that you bought from Mr. Hoffman? A. Yes, it is.

Q. I show you Government's Exhibit 17 for identification, and ask you if you recognize that carton? [168] A. Yes.

Q. Is that of a type you bought from Mr. Hoffman? A. Yes.

Q. Do you recall the date purchases that you made from Ben Hoffman?

A. You mean the amount?

Q. Yes.

(Testimony of Floyd Bishop.)

A. Approximately \$400 worth.

Q. Do you recall what proportion of those dates were of one of these two brands?

A. No, I don't.

Q. Do you have any records that might help you remember?

A. I have the record of what I bought, but it don't say which brand.

Q. Would you testify that you bought both of those brands during that period? A. Yes.

Q. You say he first approached you in November. When was the last time he approached you to sell dates, do you recall?

A. No, I don't know what date it was.

Q. Could you estimate it?

A. It was around the last of November. It wasn't very long in time.

Q. Do the bills you brought with you show how much you [169] paid for the dates? A. Yes.

Q. Could you estimate from those bills what you paid a pound for them?

A. Oh, probably could. Around 10 to 12 cents a pound.

Q. Are these the bills? A. Yes.

Q. Would you give them to me?

A. Yes. (Handing to counsel.)

Mr. Eubank: I would like to have these bills marked Government's Exhibits 22, 22-A, B and C for identification.

The Clerk: Government's Exhibits 22, 22-A, B and C for identification.

(Testimony of Floyd Bishop.)

(Said receipts were marked as Government's Exhibits 22, 22-A, 22-B and 22-C for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibits 22, 22-A, B and C for identification, and ask you if you recognize those documents?

A. Yes.

Q. And those are the ones that you brought with you this morning? A. Those are mine.

Q. How are those kept by you in your business?

A. You mean did I keep any more records except these? [170]

Q. No. This thing. When were these first written out?

A. I don't understand what you mean.

Q. What date?

A. Well, for November, they go in my books in November, is when I put them in my books.

Q. What is the nature of this instrument?

Mr. Whitney: You said what is in the exhibit you are talking about.

Mr. Eubank: Yes, sir.

Mr. Whitney: I object to it until the exhibit is introduced.

Mr. Eubank: We are trying to identify them.

Mr. Whitney: Identify it without saying what is on it.

Mr. Eubank: That is right, but he can say what they are.

The Court: Don't argue. Go ahead.

(Testimony of Floyd Bishop.)

The Witness: I see what you mean. It was dates, is what it is.

Q. (By Mr. Eubank): Now, how long is this type of record kept by you?

A. Well, I keep them all the time. I don't ever destroy it.

The Court: Is that your original record?

The Witness: Yes, sir.

The Court: The first notation you made is on one of those papers? [171]

The Witness: I beg your pardon?

The Court: The first notation you make is on one of those papers, is that right?

The Witness: I didn't write any of it. I put it in my book.

The Court: What do you keep those things for?

The Witness: For receipts at the end of the year, for my income tax.

Q. (By Mr. Eubank): Who did you get the receipt from? A. From Ben Hoffman.

The Court: It is your receipts for money paid?

The Witness: I paid for the dates, yes.

The Court: To the defendant?

The Witness: Yes.

Mr. Eubank: I ask that Exhibits 22, 22-A, B and C be admitted in evidence.

Mr. Whitney: You didn't make these up yourself?

The Witness: No, sir.

Mr. Whitney: Do you know what brand of dates each one of these referred to?

(Testimony of Floyd Bishop.)

The Witness: No, I don't. It was just dates.

Mr. Whitney: I object on the grounds they are not properly identified, and no foundation laid.

The Court: Objection overruled. They may be received. [172]

The Clerk: Government's Exhibits 22, 22-A, 22-B and 22-C in evidence.

(Said receipts were received in evidence and marked as Government's Exhibits 22, 22-A, 22-B and 22-C.)

Q. (By Mr. Eubank): I show you plaintiff's Exhibits 22, 22-A, B and C in evidence, and ask you if these documents represent the amounts that you paid Acme Distributing Company?

A. Yes.

Q. And did you see, or, this initial on the bottom of all four of these exhibits, did you see that initial put on there?

A. Yes, I did.

Q. Who put it on? A. Ben Hoffman.

Q. That is the gentleman seated over there?

A. Yes, sir.

Q. By looking at these documents, is it possible for you to tell us what you paid a pound for these dates?

A. Yes. Around 11c a pound.

Q. That is your recollection of the transaction?

A. Yes.

Q. Now, Mr. Bishop, at the time you bought those dates, do you recall what the market was in the Phoenix or Tempe area for dates? [173]

A. You mean that grade of dates?

(Testimony of Floyd Bishop.)

Q. That is right:

A. Around 10 to 12 cents a pound.

Q. Was there any representation made by Mr. Hoffman when he sold the dates to you?

A. I don't know what you mean.

Q. Well, did he use any sales pitch on selling the dates?      A. No, not necessarily.

Q. He just had dates to sell?

A. He had dates to sell, and I needed them.

Q. And you were in the market?      A. Yes.

Mr. Eubank: No further questions.

#### Cross-Examination

By Mr. Whitney:

Q. All these purchases made by you, Mr. Witness, were made in the ordinary course of business like you would do anything else?

A. That is right.

Mr. Whitney: That is all.

Mr. Eubank: That is all. May this witness be excused?

The Court: He may be.

(Witness excused.)

The Court: The Court stands at recess until two o'clock. Keep in mind the Court's admonition.

(The noon recess was had.) [174]

September 19, 1956—2:00 P.M.

Court resumed pursuant to recess.

Present: Same as before.

\* \* \*

The Court: You may proceed.

Mr. Eubank: I will call Mr. Pelley.

ROBERT L. PELLEY

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is Robert Pelley?

A. That is right.

Q. P-e-l-l-e-y? A. That is right.

Q. And you formerly had a fruit stand at 1017  
Apache Boulevard? A. That is right.

Q. In Tempe, Arizona? A. Yes.

Q. Do you presently have a fruit stand there,  
Mr. Pelley? A. I do. [175]

Q. Do you recognize the name of Ben B. Hoff-  
man? A. Yes, sir.

Q. And the name of Acme Distributing Com-  
pany? A. Yes, sir.

Q. Do you recognize Mr. Hoffman in this court  
room? A. Yes, sir.

Q. Would you point him out to the jury, please?

A. Yes, I could.

Q. This gentleman here? A. Yes.

Q. Did you do any business with Mr. Hoffman?

A. I bought dates from him.

(Testimony of Robert L. Pelley.)

Q. Approximately when was that, Mr. Pelley?

A. Well, it was during November and December of 1954.

Q. And in regard to these dates, do you recall the names of the dates?

A. Well, it was mostly Gold Cup packed by Glass Company, and there was a few of Long's.

Q. Do you have any records for your own use?

A. Yes, sir.

Q. Demonstrating those purchases?

A. I do.

Q. Did you bring those records with you?

A. Yes, sir, I have them.

Q. Would you give them to me, please? [176]

A. Yes (handing to counsel).

Mr. Eubank: I ask that these exhibits be marked as Government's Exhibits for identification 23, 23-A, B, C and D.

The Clerk: Government's Exhibits 23, 23-A, 23-B, 23-C and 23-D for identification.

(Said receipts were marked as Government's Exhibits 23, 23-A, 23-B, 23-C and 23-D for identification.)

Q. (By Mr. Eubank): Mr. Pelley, I show you Government's Exhibits 23, 23-A, B, C, and ask you if you recognize those papers or documents?

A. Yes.

Q. Would you tell us how you recognize them?

A. How do you mean?

Q. Well, what do these documents represent?



(Testimony of Robert L. Pelley.)

A. They represent cash receipts for merchandise bought.

Q. And where do you usually keep this type of instrument?

A. Well, it is kept in our regular monthly and yearly record book.

Q. And the dates on these receipts, how do they relate to the dates of purchase?

A. Well, they would correspond at least within a 30-day period.

Q. Now, these particular receipts, can you testify from these who gave you the receipts? [177]

A. That is right.

Mr. Eubank: I ask that Government's Exhibits 23, 23-A through D be admitted in evidence.

Mr. Whitney: What count does that refer to?

Mr. Eubank: This is the Long and Glass counts. That would be Counts 1, 2 and 3 of the Indictment, I think.

Mr. Whitney: I object to them on the grounds there is no foundation, and not properly identified.

The Court: They may be received.

The Clerk: Government's Exhibits 23, 23-A, 23-B, 23-C and 23-D in evidence.

(Said receipts were received in evidence and marked as Government's Exhibits 23, 23-A, 23-B, 23-C and 23-D.)

Q. (By Mr. Eubank): Mr. Pelley, referring to the exhibits that the clerk has just enumerated, would you tell us from whom each of these receipts

(Testimony of Robert L. Pelley.)

was received?           A. Each of them?

Q. Yes.

A. Each of them is from Ben Hoffman.

Q. How do you recognize that fact?

A. Well, I know that he gave them to me, and this is his signature here, and, of course, these are initialed here, meaning the same thing, I mean, written by the same person.

Q. Did he initial those before you? [178]

A. That is right, with the exception of this one, of course. Here is one here.

Q. That is 23-D?

A. Yes. And that was supposed to have been a man working with him.

Q. Now, in regard to those statements, Mr. Pelley, can you identify which of those purchases were Long's dates, and which of them were Gold Cup?

A. No, sir, I couldn't.

Q. Mr. Pelley, I show you Government's Exhibit 6 in evidence, and ask you if you recognize that pack cover?

A. The package, yes, sir. I recognize that.

Q. How do you recognize it?

A. By the brand name.

Q. And is this the type of cover that you bought from Mr. Hoffman?

A. It was, yes.

Q. I show you plaintiff's Exhibits 17 and 16 for identification, and ask you if you recognize the cover on Government's Exhibit 17?

A. I do.

Q. And how do you recognize that cover?

A. By the brand and the size of pack.

(Testimony of Robert L. Pelley.)

Q. And is this similar to dates that you purchased from Mr. Hoffman? [179] A. It is.

Q. I show you Government's 16 for identification, and ask you if you recognize that pack?

A. I do.

Q. And is that similar to packs that you bought?

A. It is.

Q. Mr. Pelley, can you by referring to Government's Exhibit 23 in evidence approximate the amount that you paid for these dates a pound?

A. Well, some of them were approximately 13c, and some of them were approximately 11.

Q. And your testimony would be that the dates that you purchased were in that range?

A. Yes.

Q. And they weren't any more than that, to your knowledge, a pound? A. That is right.

Mr. Eubank: No further questions.

Mr. Whitney: No questions.

The Court: That will be all.

Mr. Eubank: May this witness be excused?

The Court: He may be.

(Witness excused.)

## LYNN BEDFORD

called as a witness in behalf of the Government, having been [180] first duly sworn, testified as follows:

## Direct Examination

By Mr. Eubank:

Q. Your name is Lynn Bedford?

A. That is correct.

Q. And you are a special agent of the Federal Bureau of Investigation?      A. Yes, sir.

Q. And you are stationed in the Phoenix area?

A. Yes, sir.

Q. Do you recognize the name of Ben B. Hoffman?

A. Yes, Ben Hoffman is sitting right behind you.

Q. Do you recognize the name of Acme Distributing Company?      A. Yes, sir.

Q. Now, you have said Mr. Hoffman is behind me. Would you point him out to the jury?

A. He is the gentleman with the brown coat.

Q. At this table?      A. Yes, sir.

Q. Would you tell us in what capacity, or the capacity that you learned of Mr. Hoffman?

A. As a special agent of the Federal Bureau of Investigation, I first became acquainted with Ben Hoffman.

Q. And did you at any time interview him personally?

A. Yes. I talked to Ben Hoffman on two different occasions. [181]

Q. Do you recall the dates?

(Testimony of Lynn Bedford.)

A. January 21st, 1955, and again on January 23rd, 1955.

Q. And the event of the first conversation, what did you tell Mr. Hoffman, and what was his reply to your statement?

A. The first conversation I had with Ben Hoffman on January 21st, 1955, occurred right after his arrest. At that time he stated that he desired to make no statements to anyone regarding his business activities.

Q. And was anything else said at that occasion by Ben?

A. No, other than his refusal to make any statement.

Q. At the time of the second meeting, would you relate what was said at that time?

A. On January 23rd, 1955, I talked to him again, and he again advised me that he did not wish to speak to me on any matter concerning his business transactions.

Q. And that was all the statement he made to you?

A. That is correct.

Q. Now, in the course of your investigation, did you determine or look into the activity of Acme Distributing Company?

A. Yes, sir, I did.

Q. Did you go to 818 Apache Boulevard in Tempe?

A. Yes, sir, I did, on several occasions.

Q. Would you explain to the jury the type of business office that you found at that location? [182]

(Testimony of Lynn Bedford.)

A. 818 Apache Boulevard in Tempe is on the Tempe-Mesa Highway just east of the college.

818 Apache Boulevard is a small building on the north side of the highway, and consists of two small rooms. The first one is perhaps 10 feet by 10 feet square, and the second room is approximately the same size.

On one occasion I was inside the building, and there was one desk and two chairs. There was no other furniture in there.

However, there were various boxes piled up in there that had just been received by Mr. Pritchett, the owner, in the absence of Mr. Hoffman, who was in jail, and they were stored in there, and they were from a plastic molding company, in Los Angeles, California.

Q. The office that you testified to examining, that was the office of the Acme?

A. Acme Distributing Company. It had his sign on the front window, and he had a state license to do business also in that.

There were no blinds, no curtains, or any furniture or material in there except just these two chairs and a desk.

Q. Were there any books or records?

A. No books, no records, no papers, not a thing in the building.

Q. Did you attempt to find an office, Acme Distributing [183] Company, at Mesa, Arizona?

A. Yes, and I found he formerly had a place

(Testimony of Lynn Bedford.)

of business at Henry Leppla's, the Mesa Transfer & Storage Company.

Q. In further investigation of this problem, did you have the opportunity to investigate into dates?

A. Yes.

Mr. Whitney: Into what?

Q. (By Mr. Eubank): Into dates?

A. When I had received information of these dates being transported in interstate from California to Arizona, and I had received information that these dates had been flooding the market in Tempe, Mesa and Phoenix at a very low price, I immediately contacted the various fruit stands.

Mr. Whitney: I object to that as hearsay.

The Court: It would be.

The Witness: I contacted——

The Court: Just a minute. What these people told you is hearsay. You can't testify to that.

Mr. Eubank: Your Honor, he can testify to the dates he bought, can he not?

The Court: He personally bought?

Mr. Eubank: Yes.

The Court: All right, go ahead. [184]

Q. (By Mr. Eubank): Continue.

A. I contacted various fruit stands in Phoenix, Tempe, and Mesa, and made inquiry regarding the Long dates and the Gold Cup dates put out by the Glass Company in Los Angeles.

Mr. La Prade: Will you fix the time that these things took place?

(Testimony of Lynn Bedford.)

Q. (By Mr. Eubank): What was the date of the date investigation, Mr. Bedford?

A. He was arrested January 23rd, 1955, and it was the next few days after that, within a week's period of time.

Q. I show you plaintiff's Exhibit 6 in evidence and ask you if you recognize this box?

A. Yes, I recognize this box of Long dates.

Q. How do you recognize that particular box?

A. My initials are on the back of this box, showing that I had purchased this on January 24, 1955, from Wilford Claus, at 3422 East Thomas in Phoenix. He is a brother and partner of Mr. Claus that testified here yesterday.

Q. Can you testify as to the price of this particular box of dates?

A. I purchased three of these one-pound boxes for 49c. The other two pound boxes that go with it are in my briefcase.

Mr. La Prade: 49c per box?

The Witness: For the three of them. They were being sold [185] at that time six for one dollar.

Mr. Eubank: Would you mark these as exhibits, please?

The Clerk: Government's Exhibits 24 and 25 for identification.

(Said packages of dates were marked as Government's Exhibits 24 and 25, respectively, for identification.)

Mr. La Prade: Your Honor, for the record, may



(Testimony of Lynn Bedford.)

we show an objection to any testimony from the witness concerning the retail price of dates at the time or place, for the reason the defendant didn't set the retail price, and it wouldn't have any relevancy at all?

The Court: That might be true. I will let it go for the time being.

Q. (By Mr. Eubank): I show you Government's Exhibits 25 and 24 for identification, and ask you if you can identify these boxes?

A. These are the other two boxes, along with the third box that I had purchased for 49c.

Q. And these were from the——

A. From the Claus Fruit Stand on 32nd St. and E. Thomas.

Mr. Eubank: I ask that these be admitted in evidence, your Honor.

The Court: All right.

The Clerk: Government's Exhibits 24 and 25 in evidence.

(Said packages of dates were received in evidence and marked as Government's Exhibits 24 and 25 in evidence.) [186]

Q. (By Mr. Eubank): I show you Government's Exhibit 16 for identification, and ask you if you can recognize this?

A. This is a pound box of Gold Cup dates that I purchased on January 24, 1955. I purchased that from Mr. Pellet, or Pelley, that just testified before me.

(Testimony of Lynn Bedford.)

Q. You recognize this as the box?

A. That is correct. My initials appear on it.

Mr. Eubank: At this time I ask that this Government's Exhibit 16 for identification be admitted in evidence.

The Court: All right.

Mr. Whitney: It is immaterial and hearsay as to the defendant.

The Court: It may be received.

The Clerk: Government's Exhibit 16 in evidence.

(Said package of dates, Glass Company, was received in evidence and marked as Government's Exhibit 16.)

Q. (By Mr. Eubank): Now, in relation to Government's Exhibit 16 in evidence, Mr. Bedford, would you tell us the price that you paid for this particular item?

Mr. La Prade: May we object for the record? It is not binding on the defendant.

The Court: Objection overruled. [187]

The Witness: I purchased that I believe for 12c, is the price paid for it.

Q. (By Mr. Eubank): I show you Government's Exhibit 17 for identification, and ask you if you recognize this box?

A. This is a 3-pound box of Gold Cup dates which I had purchased from Bob Pelley at his place of business, 1017 Apache Boulevard, Tempe. This purchase was made on January 24, 1955, along with the 1-pound box.

(Testimony of Lynn Bedford.)

Q. How do you recognize that this is that box?

A. My initials appear on that, as well as the date, and Bob Pelley's name.

Mr. Eubank: I ask that Government's Exhibit 17 for identification be entered in evidence.

The Court: All right.

Mr. Whitney: Objection on the grounds it is not binding on the defendant.

The Court: It may be received.

The Clerk: Government's Exhibit 17 in evidence.

(Said package of dates, Glass Company, was received in evidence and marked as Government's Exhibit 17.)

Q. (By Mr. Eubank): Do you recall the price of Government's Exhibit 17 in evidence, Mr. Bedford?

A. I recall that Bob Pelley sold those dates to me at the [188] same price that he had paid for them, which I believe was around 12c per pound. That would make a total of about 35, 36c for that box.

Mr. Eubank: No further questions.

Mr. Whitney: That is all.

(Witness excused.)

Mr. Eubank: As the next witness, I would like to call Mr. Rouland Goodman.

## ROULAND GOODMAN

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

## Direct Examination

By Mr. Eubank:

Q. Your name is Rouland Goodman?

A. Yes, sir.

Q. And you are the operator and owner of Goodman's Market?      A. Yes, sir.

Q. That is a wholesale grocers' outlet, is it not?

A. Yes.

Q. Located at 350 South Park in Tucson, Arizona?      A. It was. It has been moved.

Q. Where is the present location?

A. 1055 South Campbell.

Q. In the course of your business, Mr. Goodman, do you [189] recognize the name of Mr. Ben B. Hoffman?      A. Yes, sir.

Q. Do you recognize the name of Ben B. Hoffman Wholesale Grocers?      A. Yes, sir.

Q. Do you see Mr. Hoffman in this court room today?      A. Yes, sir.

Q. Would you point him out to the jury, please?

A. Right there, with the brown suit on.

Q. In regard to Mr. Hoffman, and also in regard to the Brice, or Brice Pickle Company, do you recall a transaction that occurred where you purchased certain pickles?      A. Yes, sir.

Q. From Mr. Hoffman?

(Testimony of Rouland Goodman.)

Mr. Eubank: I would like to have this marked as Government's Exhibit 26, and following.

The Clerk: Government's Exhibits 26, 26-A, 26-B, 26-C and 26-D for identification.

(Said Bill of Lading, Report, and Invoice, were marked as Government's Exhibits 26, and 26-A through D, inclusive, for identification.)

Q. (By Mr. Eubank): Mr. Goodman, on your purchases, would you explain to the jury the technique used by your company for the record keeping purposes on purchases made by you? [190]

A. Any purchases made by us. that we purchase, our receiving clerk has a form that he fills out as to what he receives, which should match up with our freight bill, which should match up with our invoice.

Q. And then those records are kept where in your office, the freight bill and receipts?

A. They are in a file, a separate file for each company.

Q. How long do you maintain those files, usually?

A. Well, possibly indefinitely.

Q. I show you Government's Exhibits 26. 26-A through 26-D, and ask you if you recognize these instruments?

A. Yes, I do.

Q. How do you recognize these instruments?

A. This is our form of which our clerk receives the merchandise on, which his signature is on there. In both cases, the boy that received the merchandise

(Testimony of Rouland Goodman.)

has signed our receiving record, and also has signed the freight bill.

Q. On this last document here, is there anything there that you can identify as being part of your records?

A. Well, this is our invoice for the merchandise, of which when this is paid I stamp it "Paid" and put the check number.

Q. Is this your handwriting?

A. That is my handwriting there.

Mr. Eubank: I ask that these documents, 26, 26-A through [191] 26-D, be admitted in evidence.

Mr. Whitney: May I ask one question on voir dire?

The Court: All right.

Mr. Whitney: These were purchased in the regular course of business?

The Witness: Yes.

Mr. Whitney: No objection.

The Court: They may be received.

The Clerk: Government's Exhibits 26, 26-A to 26-D, inclusive, in evidence.

(Said documents were received in evidence and marked as Government's Exhibits 26, 26-A, 26-B, 26-C and 26-D.)

Q. (By Mr. Eubank): Now, referring to the invoice, could you tell the purchase you made on that date?

A. You mean what I have purchased here?

Q. That is right.

(Testimony of Rouland Goodman.)

A. 245 cases of dill pickles, 32 ounce. 295 cases of dill pickles in the 16 ounce. 150 cases of mixed sweet and sour pickles.

Q. Now, from the record of your receiving clerk, can you tell the type and character of those pickles?

A. Yes, on our receiving receipt here, we show each item as they are listed.

Q. And then the brand name? [192]

A. Brice kosher dill pickles, Brice sweet pickles, and so forth.

Q. And that is the same?

A. The other is the same, Brice dill pickles.

Mr. Eubank: Mark this as Government's Exhibit 27 for identification, please.

The Clerk: Government's Exhibit 27 for identification.

(Said check was marked as Government's Exhibit 27 for identification.)

Q. (By Mr. Eubank): I show you now Government's Exhibit 27 for identification, and ask you if you recognize that document?

A. Yes, this is one of our checks which I signed.

Q. And this is your signature?

A. That is my signature.

Q. Can you tell from looking at that what that check is in the payment of?

A. Payment of invoice of the 6th and 12th.

Q. And do you know the payment that that relates to?

A. Well, it relates to an invoice on that particu-

(Testimony of Rouland Goodman.)

lar date of six hundred and some odd cases of pickles.

Q. If I show you the invoice, could you tell me the payment that this relates to? A. Yes.

Q. I show you Government's Exhibit 26-D in evidence, and [193] ask you if this check was in payment of that invoice?

A. Yes, it is in payment of these pickles, \$1,083.75.

Q. And this check number you have written there?

A. The check number is 2488, the number 2488 on the check.

Mr. Eubank: Thank you. I ask that Government's Exhibit 27 for identification be admitted in evidence.

Mr. Whitney: The objection is that this is immaterial, has nothing to do with the charge in the Indictment.

The Court: All right, it may be received.

The Clerk: Government's Exhibit 27 in evidence.

(Said check was received in evidence and marked as Government's Exhibit 27.)

Q. (By Mr. Eubank): Mr. Goodman, are you familiar with, or would you recognize Mr. Hoffman's signature? A. No, I wouldn't.

Q. Would you recognize the letterheads of his business? A. Yes.

Q. On Government's Exhibit 26-D, was that the usual, or is that the letterhead that you would say



(Testimony of Rouland Goodman.)

you could recognize?           A. Yes.

Q. That is the letterhead of his business?

A. Yes.

Q. When Mr. Hoffman contacted you in regards to pickles, [194] would you please relate to the jury the tenor of the conversation between you two? What was the offer, and what was the acceptance?

A. It has been so long ago it would be hard to say exactly.

Q. Well, as best you recollect.

A. He offered us the pickles at a price that sounded very attractive to us, and we went down to his place and examined, I will say, six to 10 cases of pickles, to make sure that there was nothing wrong with them, which they all looked fine. And we accepted his offer.

Q. Now, on the examination of the pickles, would you explain to the jury what you were looking for when you examined them?

A. Well, we was looking for a possibility of maybe some soft pickles, or some bad pickles, because the price was kind of below normal, and we didn't want anything but what was first grade merchandise.

Q. And you determined from your examination that this merchandise was first class?

A. It was first-class merchandise.

Q. Now, all the pickles you examined, do you recall the titles or the brand name on it?

A. They were all Brice.

(Testimony of Rouland Goodman.)

Q. Is that the only pickle shipment you bought from [195] Mr. Hoffman, that you recall?

A. To the best of my knowledge, that was the only pickles we had ever bought from him, Mr. Brice, Brice pickles.

Q. Did you ever pay a visit to Ben Hoffman's Wholesale Grocers, his office?

A. Yes, on two or three occasions.

Q. When you visited this office, could you tell the jury the type of operation, the impression of the operation on you?

Mr. Whitney: I object, immaterial.

The Court: We don't care about any impression. What he saw. This is cumulative.

Q. (By Mr. Eubank): Would you testify as to what you saw in Ben Hoffman's office?

The Court: He is going to testify to the same thing that three or four other people testified to. It isn't necessary.

Mr. Eubank: All right.

Q. (By Mr. Eubank): Mr. Goodman, are you the successor of the Dick Company?

A. Well, the Dick Company was in the same building which I am in at the present time. I am not their successor. They sold out, quit business, and we took over the building.

Q. And you operated from that building?

A. We operated from the building. We didn't buy any merchandise from them. [196]

Mr. Eubank: No further questions.

(Testimony of Rouland Goodman.)

Cross-Examination

By Mr. La Prade:

Q. Mr. Hoffman's warehouse in Tucson, you say you went into it and inspected the pickles?

A. Yes, sir.

Q. Was it a good-sized warehouse?

A. What I seen of it wasn't half as large as this building. You wouldn't consider it a warehouse, no. No.

Q. It was full of merchandise, is that not correct?

A. No, it was not full of merchandise at the time I was in it.

Q. Did you know whether or not he had any other place, store or place of display for merchandise in Tucson?

A. No. I kind of assumed that he had. I didn't know.

Mr. La Prade: That is all.

Redirect Examination

By Mr. Eubank:

Q. How much other merchandise than the pickles was in that warehouse?

A. At the time that I looked at those pickles, there was just a few cases of pickles, I say 15 to 30 cases that I seen. I believe I stepped around, and there was possibly, well, there really wasn't hardly any merchandise. It may have been at the same

(Testimony of Rouland Goodman.)

time that he had some brooms back there, but I am [197] not sure, but at any time I was in there he didn't have over, let's see, \$150 worth of value in the building. That is approximately it.

Mr. Eubank: No further questions.

The Court: Is that all now?

Mr. Whitney: That is all.

(Witness excused.)

Mr. Eubank: Mr. John E. Doyle.

### JOHN E. DOYLE

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is John E. Doyle?

A. That is right.

Q. And you are presently living at 3525 East  
Bellevue? A. 3525 East Bellevue.

Q. That is in Tucson, Arizona?

A. Tucson, yes.

Q. And, Mr. Doyle, do you recognize the name  
of Ben B. Hoffman? A. Yes.

Q. Do you recognize the name of Benjamin B.  
Hoffman Wholesale Grocers?

A. A broker, yes. [198]

Q. And do you see Mr. Hoffman in this court  
room?

(Testimony of John E. Doyle.)

A. Yes, there he is back there, the bald-headed fellow right back of you.

Q. What color coat does he have on?

A. Brown.

Q. How do you know Mr. Hoffman?

A. I worked for him.

Q. How long did you work for him?

A. For a week.

Q. Where did you work for him?

A. South 4th Avenue in Tucson.

Q. Do you recall the approximate street number?

A. That is between sixteen two and sixteen six, along in there.

Q. Where did you live at that time?

A. Right across the street.

Q. How long did you live across the street?

A. I lived there about three years.

Q. During the time you lived there, how long was the Hoffman enterprise operated across from you?

A. I will have to guess about this.

Mr. La Prade: We object to his guessing, your Honor.

The Court: All right.

Q. (By Mr. Eubank): Can you testify of your own knowledge, approximately? [199]

A. Close to a year.

Q. In that year you are talking about, can you give us a date, I mean the dates—as you recall it, the date that the business operated across from you?

A. Around in June somewhere.

(Testimony of John E. Doyle.)

Q. What year? A. 1954.

Q. Are you sure it is 1954? You say you worked for Ben about a week? A. Yes.

Q. What were your working hours?

A. From eight in the morning to four in the afternoon.

Q. And what was your pay?

Mr. Whitney: I object as immaterial.

The Court: He may answer.

The Witness: I don't know what the pay was. He give me \$5 a week.

Q. (By Mr. Eubank): When you worked for Ben, how would you describe your job? What were you supposed to do?

A. I was janitor, and answering the telephones.

Q. What was your time, what were the hours you worked?

A. From eight in the morning until four in the afternoon.

Q. During that time, in the week you worked for Mr. Hoffman, was he at the office? [200]

A. Yes, he was at the office in the morning.

Q. How long was he usually there at each of those days?

A. Well, he went home for lunch. Then he came right back.

Q. Was he there most of the day?

A. Yes, most all the day.

Q. Being in the office, you must have observed his business operation? A. Yes, I did.

Q. Did he have any files in the office?

(Testimony of John E. Doyle.)

A. No.

Q. Were there books or records in the office?

A. No.

Q. Did he have any employees?

A. Only me and him, that is all, and his wife come in once in a while.

Q. What was the character of Mr. Hoffman's business? What did he do to get business?

A. Well, he would come in in the morning with a list his wife give him. She come down and handed him the list, and he would call up these, the long distance operator, and he would give them a list of people that he wanted to call, give him four, five, six or seven of them. And then she would put in the calls, and they called him, and he would order the stuff, whatever he had on the list.

Q. Now, on these particular calls, were those prepaid [201] calls, or were they collect calls?

A. The other party paid for them.

Q. In other words, it was a collect call?

A. No, it was not collect.

Mr. Whitney: Your Honor, I object. May we ask a question on voir dire?

The Court: You can cross-examine.

Q. (By Mr. Eubank): Now, could you approximate the number of these calls you overheard while you were in the office?

A. Yes, I got a list here. Is it all right to look?

Q. Not right at the moment. I am asking for an approximate number, if you can give one.

A. I don't know how many he had. I got it right

(Testimony of John E. Doyle.)

down here, sir. That is some of his paper there, too.

Q. On these collect calls they made, were they quite numerous in a day's time? A. Yes.

Q. Now, you say that you overheard collect calls. Do you recall the character of the conversation?

A. Well, I will just tell you how he used to say it, Mike, and I won't give you the names, and them, because I can't remember the names.

He called and said, "Hello, is this Mr. Jones?" "Yes." "How are you, this is Ben Hoffman, the broker, in [202] Tucson, Arizona, South 4th Avenue.

"How is business?" That is the way he started out.

Then he would ask them what the article, the price it was, whatever he wanted, and asked him the size of the cans and all that, then he wanted to know if he could get a truckload, and he would want the truckload. And he said, "Don't forget to put some samples in for the boys."

Q. Now, were there any salesmen hired by Mr. Hoffman while you were there? A. No.

Q. Did you see any salesmen come into the office? A. No. Nobody come in.

Q. Now, on these phone calls that you say you wrote down a memorandum on.

Mr. Whitney: Did he say he wrote a memorandum on it?

Mr. Eubank: Yes.

Q. (By Mr. Eubank): Do you have that memorandum with you? A. Yes.

Q. Can you of your own, of your own independ-



(Testimony of John E. Doyle.)

ent recollection recall those calls, or do you have to refer to that?

A. I got to refer to this here. That is what I wrote right in his office there, and I kept it. That is the same paper I kept.

Q. That is, referring to this, you can testify as to [203] what his calls were?

A. Sure. Sure. I ain't going to lie against the man. I'm telling the truth.

Mr. Eubank: I ask that this be marked as plaintiff's Exhibit 28 for identification.

The Clerk: Government's Exhibit 28 for identification.

(Said memorandum was marked as Government's Exhibit 28 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 28 for identification, and ask you if this is the list you were describing? A. Yes.

Q. And when was this list written?

A. 1954.

Q. And when the list was written were you then in the employment of Ben Hoffman? A. Yes.

Q. And do you relate this list with any particular day? Any day of your employment?

A. Every day, yes, added to it.

Q. Does this list include all the calls, or just a few calls you overheard?

A. This is the main calls that I remembered.

Mr. Whitney: Your Honor, I ask that this be admitted in evidence not for the purpose of refresh-

(Testimony of John E. Doyle.)

ing his recollection, [204] but as the evidence he would give.

The Court: He can use that to refresh his recollection.

Mr. Whitney: For what purpose?

Mr. Eubank: For refreshing his memory.

Mr. Whitney: If he is refreshing memory, then you don't put it in. It is either recorded recollection, or nothing else.

Q. (By Mr. Eubank): Using that list, can you then testify of your own recollection? A. Yes.

Q. Can you tell us the nature of the telephone calls that were made that you listed there, by Ben Hoffman? A. He ordered pickles.

Q. All right.

A. A whole truckload of pickles.

Mr. Whitney: If the Court please, I object on the grounds that if this recorded at the time, that is the best evidence. If it is not recorded, that is something else again. But if that was made at the time, that is one thing. If it is made at the time, then it probably could be entered.

The Court: He said it was made at the time.

The Witness: Made at the time, and I heard him make it, too.

The Court: All right, go ahead. Tell us what was said. [205]

Q. (By Mr. Eubank): All right, pickles.

A. Pickles.

Q. What were some of the other calls?

A. He ordered peaches, 2½ canned peaches. He

(Testimony of John E. Doyle.)

asked me if I liked peaches. I said yes. He said, "You will get some when they come in."

Q. What were some of the other orders?

A. He ordered brooms, two places, Denver and Texas. Peas. Rice.

Q. Do you recall where the peas were from?

A. I think over in Virginia, or Georgia some place over in there, black-eyed peas, they call them.

Q. What else do you have on there?

A. He had percolators, that is, a coffee urn up in Los Angeles. He had suitcases. I don't know where they come from. Mustard greens in the can. Pears. Coffee, Kansas City, Missouri. That is Conway Coffee Company. Juices of all kinds. Sardines and salmon.

Q. All right, now, Mr. Doyle——

A. After I made this list, I checked with the Better Business Bureau.

Mr. Eubank: That is all right.

Mr. La Prade: We object to any such statement.

The Court: No. You weren't asked a [206] question.

Mr. Eubank: We don't want any of that.

Q. (By Mr. Eubank): When you were hired, did Mr. Doyle explain the business to you, rather, did Mr. Hoffman explain the business to you, did he tell you what type of business he was in?

A. He told me he was a broker. You mean Mr. Hoffman?

Q. Yes, Mr. Hoffman, pardon me.

A. He was a broker.

(Testimony of John E. Doyle.)

Q. Did he describe what kind of broker he was?

A. Yes, he handed me a card, too.

Q. You were terminated at the end, or after a week, is that correct?

A. Yes, he canned me.

Q. For what reason did he can you?

A. Because I reported him to the Ruben Golds. He ordered furniture. He didn't have a penny to pay for it. And I told him they better watch out, because there was something crooked there somewhere.

Q. And he fired you for that reason?

A. Yes.

The Court: We will have our afternoon recess at this time.

(The afternoon recess was had.)

The Court: You may continue.

Q. (By Mr. Eubank): Mr. Doyle, while you were working at Mr. Hoffman's [207] establishment, were any shipments received at the establishment?

A. No, they were sent down to the Tuscon warehouse.

Q. Was there any storage facility in conjunction with this office?

A. Well, samples were put in there.

Q. And where was the storage room?

A. Well, there was a little partition that was up there that they put in back of the partition, and his samples back there.

(Testimony of John E. Doyle.)

Q. Now, in regard to the list that you compiled, why did you compile that list?

A. Well, I didn't think he was doing right.

Mr. Eubank: No further questions.

The Court: That last could be stricken. This case shouldn't be decided on what this witness thinks. Disregard that. It is for you to say whether he is guilty or not, not a witness that is called here to testify.

Cross-Examination

By Mr. La Prade:

Q. Mr. Doyle, where are you employed at the present time?

A. I am retired off the railroad.

Q. How long have you been retired?

A. 1949.

Q. You just had incidental jobs since [208] 1949?

A. The only job I had was with Hoffman.

Q. Did you ask him for that job?

A. I believe I did. He was looking for a man, and I was standing there, and I——

Q. How long did you actually work for him?

A. One week.

Q. Exactly how many days, do you recall?

A. Seven.

Q. Seven full days?

A. Six days. Six days, I take that back. Six days.

(Testimony of John E. Doyle.)

Q. Mr. Doyle, have you had any other janitor jobs?       A. No.

Q. Are you here under subpoena to testify today?       A. Yes.

Q. When did you arrive in Phoenix?

A. 1948.

Q. I mean this week, sir, did you just come up today?

A. I just come up today, yes. I used to live here some time ago.

Q. Prior to today, Mr. Doyle, have you had an opportunity, or did you talk to any representative of the Government concerning this case, any of the F.B.I. men, or postal inspectors?

A. Oh, I come down to the office, the postal inspector he wanted to know if I would come up and testify, and I said if you want me. [209]

Q. This gentleman right here in the blue coat?

A. Yes.

Q. When was that, sir?

A. I don't know what day it was. Thursday or Friday, something like that.

Q. That was the first contact you had had at all by anybody representing the United States Government concerning this case?       A. Yes.

Q. It is your testimony that this list that you say you took down in 1954, you just happened to still have in your possession?

A. Yes, I had it, I kept it.

Q. You kept it all this time?       A. Yes.

Q. For what purpose did you keep it, sir?

(Testimony of John E. Doyle.)

A. Well, when I went to the County Court, I kept it from there. I said, well, if the case will ever come up like that, I will have it. I am a great man to keep papers, railroad papers, and such stuff.

Q. Did you write all these down at the same time?

A. When he was ordering them, I wrote them down.

Q. Were these all on the same day?

A. No, not all of them on the same day, no.

Q. Different items were put on this Government's Exhibit [210] 28 on different days?

A. Yes.

Q. And did you use the same writing instrument on each occasion, that is, referring to the ink items?

A. I don't get you.

Q. Did you use the same pen, sir, on each of those items?

A. That is on one fountain pen, and this here was in pencil (indicating).

Q. When was this exactly? Will you pin that down for us?

A. In 1954.

Q. In what month of 1954?

A. June.

Q. Do you recall what week in June? Do you remember?

A. No. I can't recall what week, no.

Q. And what was it that caused you to write this down? Tell us that.

A. Because the way he acted. He didn't act right, and he said he didn't like——

(Testimony of John E. Doyle.)

Q. Just answer the question, sir.

The Court: What are you doing? I cut this all out. If you want it in, it is your fault, not the Court's

The Witness: He said he didn't like a policeman, and I was a policeman, and I was a deputy sheriff, too. He said he didn't like a policeman, and he didn't like a deputy sheriff. [211]

Q. (By Mr. La Prade): Mr. Doyle, do you have any record of the exact day that these phone calls were made you have testified about?

A. No. When I first went to work for him that morning, he started in on that telephone, and he never let up until four o'clock.

Q. When was it you made these notations, right after he made the phone calls, or while he was making them?

A. While he was making the phone calls, I would go back and write it down.

Q. Where? Right in back of the office?

A. Yes, right in back of the office.

Q. Did you listen in on his conversations?

A. Yes.

Q. Could you tell who he was talking to?

A. Well, I didn't put them down, but them were the people he called, that represents that product there.

Q. How does it happen you wrote down these different items of pickles, peaches, rice, percolators, suitcases, and so forth, without writing down where he was talking to? Was there any reason why you



(Testimony of John E. Doyle.)

put down the items, rather than where he was talking to?

A. Some of them I remember where he called. I remember where it was, like that percolator was Los Angeles Coffee Urn, was the name of the company. [212]

Q. Mr. Doyle, do you make it a habit to write down portions of your employers' conversations when you are listening to conversations?

A. Sometimes I do it. Conductors, and so forth, when I am on the road, keep a book. If you are going to be a good railroad man you got to do it.

Q. Couldn't this possibly be a grocery list of your own, Mr. Doyle?

A. Not mine. Maybe the wife's, but not mine. I ain't got no grocery list.

Q. Are you positive about all of your testimony, Mr. Doyle?      A. What?

Q. Are you positive about all of the testimony you have given?      A. On them there?

Q. There is no question about when it was?

A. No question about it at all.

Mr. La Prade: That is all.

The Witness: I ain't lying. You think I'm a liar?

Mr. Eubank: No further questions.

The Court: That will be all.

(Witness exused.)

Mr. La Prade: We offer this Government's Exhibit in evidence here for whatever it may be worth, Government's [213] Exhibit 28.

The Court: All right, it may be received.

The Clerk: That will be defendant's Exhibit B in evidence.

(Said Memorandum was received in evidence and marked as Defendant's Exhibit B.)

(The above exhibit was also marked as Government's Exhibit 28 for identification.)

Mr. Eubank: I will call R. O. Kelley.

R. O. KELLEY

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is R. O. Kelley?

A. Yes, sir.

Q. You are the owner of R. O. Kelley Cannery?

A. Yes.

Q. At Midville, Georgia? A. Yes.

Q. Mr. Kelley, are you familiar with the name of Ben B. Hoffman?

A. Ben B. Hoffman Grocery Company, yes.

Q. And you have never personally met Mr. Hoffman, have you? A. No.

Q. Would you tell us how you became familiar with Ben B. [214] Hoffman Groceries?

A. Mr. Holmes of Holmes Canning Company had an inquiry from Mr. Hoffman about a certain

(Testimony of R. O. Kelley.)

size can of vegetable that we canned, and he didn't have them.

Q. What product?

A. Field peas with snaps. So he gave me the name and address.

Q. And you contacted him?

A. I contacted Hoffman Grocery Company.

Mr. Eubank: Mark this as Government's Exhibit 29 for identification.

(Said copy of letter was marked as Government's Exhibit 29 for identification.)

Q. (By Mr. Eubank): How did you contact Mr. Hoffman? A. I wrote him.

Q. And the original of that letter, what did you do with it?

A. The original was mailed to Mr. Hoffman.

Q. Was a copy retained? A. Yes.

Q. In your files? A. Yes.

Q. I show you Government's Exhibit 29 for identification and ask you if you recognize that document? [215] A. Yes.

Q. How do you recognize the document, Mr. Kelley? A. Well, by what I just stated.

The Court: You wrote the letter, didn't you?

The Witness: Yes. I dictated the letter myself.

The Court: All right.

Q. (By Mr. Eubank): And this is the letter you were talking about? A. Yes.

Mr. Eubank: I ask that Government's Exhibit 29 be introduced in evidence.

(Testimony of R. O. Kelley.)

Mr. Whitney: If the Court please, we object to this as hearsay as to the defendant, not the best evidence, and on the particular grounds that this is a letter to the Hoffman Grocery Company, where there has no foundation been laid for it in connection with counts 7 and 8 of the Indictment.

The Court: All right, it may be received.

The Clerk: Government's Exhibit 29 in evidence.

(Said copy of letter was received in evidence and marked as Government's Exhibit 29.)

Q. (By Mr. Eubank): Now, in regard to the original of this letter, Mr. Kelley, will you testify what happened to it? You say you mailed it. Will you describe that process, if you know.

A. That was mailed to Hoffman Grocery Company in Tucson. [216]

Q. And did you mail it yourself?

A. Yes, by government mail. No, mailed through the office there. My bookkeeper usually looked after the mail, or most of the letters are mailed, outgoing letters are mailed at night as we leave the office, and perhaps I could have mailed it, or maybe he did. I couldn't be positive about that.

Q. You have a routine in your office for the mailing of business letters, is that correct?

A. Yes.

Q. And that routine is as you have just said?

A. Yes.

Q. Now, in regard to Government's Exhibit 29,

(Testimony of R. O. Kelley.)

would you please read to the jury the contents of the letter to Mr. Hoffman?

A. (Reading): "Hoffman Grocery Company, Tucson, Arizona. Gentlemen——"

Mr. Whitney: If the Court please, the thing speaks for itself.

The Court: The jury doesn't know it. It doesn't speak loud enough. Go ahead.

The Witness (Continued): "Our good friend Mr. Holmes of Holmes Canning Company at Sandersville, Georgia, has given us your name as one that has made inquiries to him for field [217] peas with snaps. He advises us that he is not in position to furnish these due to a short pack. We are in position to give all the 2's that you will want, and will be glad to quote you in car lots f.o.b. Midville, or Millen, Georgia. Possible Millen as we have all our No. 2's stored in that warehouse. If interested we will be glad to furnish you samples.

"We are the oldest packer of field peas in the United States and all our pack is Government Graded, and we can furnish you certificates, with every can we ship or every lot we ship. Feel sure that you will like the product, once you have used it.

"We are hoping to hear from you, we are, Yours very truly, R. O. Kelley Cannery, by R. O. Kelley."

Q. Now, did you receive a reply to that letter?

A. Yes.

Q. And approximately how long after that letter did you receive the reply, do you recall?

A. Oh, it has been such a long time. I imagine

(Testimony of R. O. Kelley.)

about 10, 15 days. Perhaps not that long. I am not sure.

Mr. Eubank: Will you mark this, please?

The Clerk: Government's Exhibit 30 for identification.

(Said letter was marked as Government's Exhibit 30 for identification.)

Q. (By Mr. Eubank): I now show you Government's Exhibit 30 for identification, [218] and ask you if you recognize this document?

A. Yes.

Q. And how do you recognize this document?

A. By this signature of mine on there, and also the address, addressed to me.

Q. Now, is this the letter that was the reply to the letter that you sent? A. Yes.

Mr. Eubank: I would like to offer this letter in evidence.

Mr. Whitney: Objected to on the grounds it is no sufficient proof, hearsay as to the defendant, not the best evidence.

The Court: All right, it may be received.

The Clerk: Government's Exhibit 30 in evidence.

(Said letter was received in evidence and marked as Government's Exhibit 30.)

Q. (My Mr. Eubank): Mr. Kelley, I show you Government's Exhibit 30 in evidence, and ask you to read this letter that you received.

(Testimony of R. O. Kelley.)

A. (Reading): "August 24th, 1953. R. O. Kelley Cannery, Post Office Box 175, Midville, Georgia. Dear Mr. Kelley: Received your letter of August 20th advising me that you are in a position to supply me with No. 2 peas. Would appreciate if you would furnish samples immediately, and then I will get [219] in touch with you to see if we can work out an order for a truckload or a carload.

"Thanking you in advance. Yours very truly, Ben B. Hoffman."

Q. Now, in reply to this letter, did you ship peas? A. Yes.

Q. Now, was there any other communication before you shipped the peas, with Mr. Hoffman?

A. Yes, sir, he called me collect before.

Q. And is there a method by which you can tell the date of that telephone call?

A. On the paid telephone bill, is the only records we have of it.

Mr. Eubank: I ask that this be marked as Government's Exhibit 31 for identification.

The Clerk: Government's Exhibit 31 for identification.

(Said telephone bills were marked as Government's Exhibit 31 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 31 for identification, and ask you if you recognize these documents? A. Yes.

Q. And what are the documents?

(Testimony of R. O. Kelley.)

A. Those are the paid telephone bills of mine, for October 1st. [220]

Q. And is that the document whereby you can tell the date of the Collect telephone call?

A. Yes.

Mr. Eubank: I ask that Government's Exhibit 31 be admitted in evidence.

Mr. La Prade: We object to the introduction of this Exhibit 31 for identification, upon the ground that there has not been a sufficient identification of the person having placed the call having been this defendant.

The Court: All right, it may be received.

The Clerk: Government's Exhibit 31 in evidence.

(Said telephone bills were received in evidence and marked as Government's Exhibit 31.)

Q. (By Mr. Eubank): Can you tell by looking at this exhibit, Government's Exhibit 31 in evidence, the date of the collect phone call to you, Mr. Kelley?

A. This is on September 1st, 1953.

Q. And what is the pay station shown there? Where did the call come from?

A. Hoffman Grocery Company.

Q. And located where?

A. Tucson, Arizona.

Q. And this bill that you have, what telephone is that billed to? [221]

A. That is billed to me through Pineland Telephone Co-op, Swainsboro, Georgia.

Q. Was that to the phone at your office?



(Testimony of R. O. Kelley.)

A. Yes.

Q. And that is Midville, Georgia?

A. Yes.

Q. And you received this call in Midville, Georgia?      A. Yes.

Q. Now, in relation to that Collect telephone call from Mr. Hoffman, would you relate the conversation you had with Mr. Hoffman?

A. As I recall, Mr. Hoffman wanted me to go ahead and ship him a truckload.

Q. And what happened?

A. And at that time our trucks were busy, and I asked to ship a small carload, that it would be very little difference in the number of cases, and he gave me permission to go ahead and ship this minimum carload.

Q. In that conversation, did you discuss at all his credit situation?      A. No, I didn't.

Q. Did you discuss any other terms than the terms that you had already discussed in the mail?

A. To my knowledge I didn't, other than just the standard terms, and I don't think they were mentioned. [222]

Q. Is there any other statement you recall that Mr. Hoffman made at that particular occasion?

A. No, I do not recall.

Q. Now, as to the date of the shipment, would you please relate to the jury what happened when you shipped the peas, where you had them put on the freight cars?

A. Well, that was loaded on the Central Georgia

(Testimony of R. O. Kelley.)

tracks at Millen, and I think about four days later shipped into Tucson on our regular formal bill of lading.

Q. And was that a straight bill?

A. Straight bill of lading.

Q. Will you explain to the jury what a straight bill of lading is?

A. That is one that you receive on an open account bill of lading.

Q. These peas, then, were shipped on open account?

A. They were shipped on open account.

Q. Did anyone change that billing en route, that you know of?

A. Yes, we had it changed.

Mr. Whitney: I object to that as hearsay.

The Court: I don't know what it is. Go ahead.

The Witness (Continued): At the time Mr. Hoffman gave me the order, through the bank I put in for a report, a financial report. [223] And that was late coming in. That is the reason why the shipment was held up about four days. And I didn't get it, so I shipped them anyways, and after I got the report, it was in such condition that I didn't feel that he warranted any credit, and I wired and had the bill of lading changed over to a sight draft, bill of lading attached.

Q. (By Mr. Eubank): Now, as a result of your changing the bill of lading, what happened to the peas shipment?

A. The railroad in Tucson was notified to notify Mr. Hoffman when he came in, and give him 12

(Testimony of R. O. Kelley.)

hour, and if he didn't take them up at that time, they were to be reshipped to Lafayette, Louisiana, and unloaded there.

Q. Now, in regard to this change of shipping plan and order, did you then call Mr. Hoffman at any time?

A. Yes, I called him and told him what I was having to do, and why.

Q. And what was his statement to you?

A. He wanted to know where I got the information from. I told him the information I had he didn't warrant any credit, and I would have to put a sight draft, bill of lading attached, on the car.

Q. And what did Mr. Hoffman say then?

A. He just hung the phone up.

Q. And is that the last you ever heard of [224] him?

A. That is the last I have ever contacted Mr. Hoffman.

Q. Now, in regard to the return shipment, which of these records that you brought, Mr. Kelley, is the railroad statement showing the return of the shipment? Can you tell me?

A. This is the freight bill, returned freight bill (indicating).

Q. This is the returned freight bill?

Mr. Eubank: Would you mark this as plaintiff's Exhibit 32 for identification?

The Clerk: Government's Exhibit 32 for identification.

(Testimony of R. O. Kelley.)

(Said freight bill was marked as Government's Exhibit 32 for identification.)

Q. (By Mr. Eubank): I show you now Government's Exhibit 32 for identification, and ask you if you recognize that freight bill? A. Yes.

Q. How do you recognize it, Mr. Kelley?

A. Because it was mailed to me and I had to pay out this amount of money.

Q. Now, do you keep this type of thing in the business records of your company? A. Yes.

Q. And was this removed from those business records when you came, when you were subpoenaed here?

A. I removed it and gave it to the United States Marshal, [225] I believe, then.

Mr. Eubank: I move that Government's Exhibit 32 for identification be received in evidence.

Mr. Whitney: May I ask a question on voir dire?

The Court: Yes.

Mr. Whitney: With reference to Government's Exhibit 32 for identification, I notice the consignee is the Progressive Brokerage Company.

The Witness: That is right.

Q. (By Mr. Whitney): That has nothing to do with Mr. Hoffman?

A. No, that is my broker that I had to ship it back to.

Mr. Whitney: I object to it on the grounds it is immaterial and not binding on Mr. Hoffman.

(Testimony of R. O. Kelley.)

The Court: I really don't see the purpose of it myself.

Mr. Eubank: It is just to show the return of the peas, that is all.

The Court: Well, all right. It is immaterial.

The Clerk: Government's Exhibit 32 in evidence.

(Said Freight Bill was received in evidence and marked as Government's Exhibit 32.)

Q. (By Mr. Eubank): Now, Mr. Kelley, what was the loss to you of this return shipment?

Mr. La Prade: I object, your Honor. It is immaterial. [226]

The Court: Yes, I think so.

Mr. Eubank: All right.

Q. (By Mr. Eubank): On the telephone calls you have testified to, those are the only two calls you had with Mr. Hoffman, is that correct?

A. To the best of my knowledge, right now, it is.

Mr. Eubank: I have no further questions.

#### Cross-Examination

By Mr. La Prade:

Q. Mr. Kelley, as between yourself and your company, and the Hoffman Grocery Company, or Mr. Hoffman, isn't it true that those business negotiations commenced with your writing a letter to Mr. Hoffman? That is how you started doing business with Mr. Hoffman, isn't that right, sir?

A. That is right.

(Testimony of R. O. Kelley.)

Q. And you made a deal for a credit transaction, and later after shipping the merchandise you changed your mind, isn't that correct?

A. After finding out his credit rating, yes.

Q. And you testified that no reference was made over the phone with regard to his credit, I mean, Mr. Hoffman's credit? That wasn't discussed very much? There weren't any representations to you that he had an excellent credit rating, or anything of that sort, was there? [227]

A. No, there was not any mention of it.

Q. And as far as you are concerned, this is just a transaction where you changed your mind, and you got your merchandise back, isn't that right?

A. I got it back——

Q. Except for the inconvenience, but Mr. Hoffman didn't contact you in the first instance, did he?

A. No, he didn't contact me.

Q. Mr. Kelley, how many employees do you have in your office that might be engaged in secretarial work, or the type of work where they would be opening your mail?

A. I only have one bookkeeper regular. There is my wife helps at some times, and during my rush season, I have a lady helper that helps the bookkeeper.

Q. Referring to Government's Exhibit 30 in evidence, which purports to be a letter from Ben B. Hoffman to R. O. Kelley Company in Midville, Georgia, did you open that letter yourself?

A. Well, I rather think so. If I am away, the

(Testimony of R. O. Kelley.)

mail is opened by my bookkeeper. If I am there, I open all the mail, and to the best of my knowledge I opened that letter.

Q. But you are not sure?

A. Well, I am not definite sure, no.

Mr. La Prade: If your Honor please, at this time we move to strike from the record and from the evidence Government's [228] Exhibit 30, which has heretofore been admitted, upon the grounds there has been no foundation of showing—if the Court please, we will withdraw the objection I was just making, and stand upon the original objection when it was originally introduced.

That is all.

### Redirect Examination

By Mr. Eubank:

Q. In regard to the question propounded to you by the counsel for the defendant, about this being the ordinary transaction, do you consider this the ordinary transaction, or did you consider this the ordinary transaction then when you got your peas back? A. No, sir.

Q. In the ordinary course of your business, would you explain how you give credit, and why you gave credit in this particular instance?

Mr. La Prade: If the court please, this is improper redirect. He has testified there was not any conversation with regard to credit.

The Court: I know, but I think you have opened all this up by your cross-examination.

(Testimony of R. O. Kelley.)

The Witness: What was that question?

Q. (By Mr. Eubank): Why did you give him the credit, or extend the credit? [229] Was it the fact that he was recommended to you?

A. Mr. Holmes from Holmes Canning Company, I thought he had all the information.

Q. And on that basis——

A. On that basis I didn't mention terms when the orders were given.

Mr. Eubank: No further questions.

Mr. Whitney: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Eubank: Your Honor, at this time, I would like to request that we present one piece of testimony out of order. That is the testimony of Mr. Gavin of Gavin Brothers, and he is in the middle of Salmon season in Washington, and he tells me that he has numerous deals that are waiting upon his arrival back there. He was here yesterday, and I would like to if possible get him on today. The reason I am asking this is that he is the actual packager of the product, but he did not make the contractual arrangement with Mr. Hoffman. That was made through a broker.

The Court: All right.



T. J. GAVIN

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is T. J. Gavin? A. Right.

Q. And you are one of the Gavin brothers?

A. Gavin Brothers, Incorporated.

Q. And you were formerly in the Coleman Building?

A. That is right, Coleman Building, Seattle.

Q. Seattle, Washington? A. Yes.

Q. Where are you located now, Mr. Gavin?

A. 1500 West Lake Avenue North, in Seattle.

Q. What is the character of your business?

A. We are canned salmon sales agents.

Q. What does that entail?

A. We act as sales agents for a group of canned salmon packers in Alaska and various other areas. We handle the marketing, shipping, and invoicing, complete distribution of their packs of canned salmon.

Q. Do you package under any particular label?

A. Well, we have our own labels, and we sell a good deal of our distribution under buyers labels, private labels.

Q. Under what?

A. Buyers labels, as well as our own labels.

Q. Buyers?

(Testimony of T. J. Gavin.)

A. Buyers, B-u-y-e-r-s, wholesale grocers have their own [231] brands, you see.

Q. And you also sell under Gavin?

A. That is right. We sell our own labels, also.

Q. What are the names of the labels?

A. We have a number of brands of our own. We have a Gavin's brand, a Sea Ranger brand, Sea Leader brand, Dainty Miss, Challenger brand, just to name a few of them.

Q. Are all of those brands with your name, do they also have the name of the Gavin Brothers located on the can? A. Oh, yes, our name is on it.

Q. So that any particular sea fish that were packed by your organization could be identified by your name?

A. Well, yes, but we also ship sometimes under packers labels where it shows the packers' name on it.

Q. You are here under a subpoena duces tecum?

A. Yes.

Q. And we asked you to bring with you certain business records?

A. I am sorry, I can't quite hear you.

Q. You are here under subpoena duces tecum, and were asked to bring with you certain business records? A. That is right.

Q. Do you have those records with you?

A. I have them with me. (Handing to counsel.)

Q. These records relate to what particular transaction? [232]

A. These invoices and drafts, and enclosure re-

(Testimony of T. J. Gavin.)

ceipts that are attached to them, refer to shipments made by us to the Acme Distributing Company, whose address was given up as Tempe, Arizona.

Mr. Eubank: I ask that these three exhibits be marked for identification.

The Clerk: Government's Exhibits 33, 34 and 35 for identification.

(Said Gavin Brothers documents were marked as Government's Exhibits 33, 34 and 35, respectively, for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibits 33, 34 and 35 for identification, and ask you if you recognize those documents?

A. Yes, I do.

Q. Would you look at it?

A. This first exhibit?

Q. Yes. How do you recognize that?

A. That is our draft No. 9547, and our invoice No. 967, covering the shipment of—

Q. That is O.K. That is good enough.

A. That is sufficient identification?

Q. Yes. And do you recognize the second one?

A. I signed the draft, yes, so I recognize it.

Q. Now, the next one, that is 34 you are identifying now? [233]

A. Our draft No. 9556, invoice No. 971. Another shipment, otherwise identical.

Q. Do you recognize that signature?

A. Yes. She is the duly authorized secretary of the corporation.

(Testimony of T. J. Gavin.)

Q. And you recognize her signature?

A. Yes, I recognize her signature.

Q. Now, in regard to Exhibit 33 for identification?

A. A similar set of documents, our shipping order, draft No. 9552, invoice No. 969.

Q. And you recognize that?

A. And it is similar. This is signed by the secretary. She is authorized to sign drafts, yes, sir.

Q. How are these documents kept in your business files?

A. These are the originals here, and when they are made out they are sent to the bank in Seattle, the bank we usually use for collection purposes. They are sent through bank channels to the destination city, in this case, Tempe, Arizona, through some bank, usually their correspondent, and they are sent there, and the buyer, the party, that is, the notified party on the draft known as the buyer or drawee, is notified the drafts are there, and normally he comes in and pays them.

Q. In this case, how does it happen that you have the original drafts?

A. Well, these were returned to us after due course by [234] the bank. There is one mention on there, the bank has a stamp on it——

Mr. Whitney: Wait a second.

The Court: It is not in evidence.

Mr. Eubank: It isn't in evidence.

Mr. Whitney: If the Court please, I don't know when he is going to attempt to introduce this, but

(Testimony of T. J. Gavin.)

there isn't an iota of charge in the indictment with reference to that transaction.

The Court: I don't know a thing about it. We will see more about it later. Go ahead.

Mr. Eubank: At this time, we offer Exhibits 33, 34 and 35 in evidence.

Mr. Whitney: Count IV of the Indictment which the United States Attorney called to my attention when I asked a moment ago charges that on the 14th of June, 1954, in the District of Arizona, the defendant Hoffman, for the purpose of executing a scheme, did by interstate wire telephone Grant-Whitman Company at Spokane, Washington, not Gavin Brothers, but Grant-Whitman.

When we asked for a bill of particulars to find out who was telephoned to, the answer came from the United States Attorney, Jack Ehlinger. That is on page 2 of the Bill of Particulars, so I say, your Honor, that this is not binding on the defendant.

It is immaterial, irrelevant, and incompetent to prove [235] anything in this case, as far as this Indictment and this Bill is concerned.

The Court: We haven't gone far enough yet.

Mr. Whitney: Pardon?

The Court: I don't know. I can't determine it yet. The objection will be overruled at this time. If they don't connect it up, it will be stricken.

Go ahead.

The Clerk: Government's Exhibits 33, 34 and 35 in evidence.

(Testimony of T. J. Gavin.)

(Said documents of Gavin Brothers were received in evidence and marked as Government's Exhibits 33, 34 and 35, respectively.)

Q. (By Mr. Eubank): Mr. Gavin, I show you Government's Exhibits 33, 34 and 35 in evidence. In regard to Exhibit 33 in evidence, will you tell who that shipment was made to?

A. Yes, I can. This is an original enclosure receipt showing that these goods were taken over by Canned Goods Shippers Association for their pool car shipping organization.

I might mention that in shipping canned goods, it is necessary to get the very best rate, so we have to ship our goods in maximum, I mean in minimum pool cars, or pool trucks.

This particular order was far less than the minimum pool truck, and such orders we call L.C.L. or L.T.L., less [236] than truckloads, which are pooled by this organization of Canned Goods Shippers to give the buyer the benefit of a lower rate, so this is an enclosure receipt in their truckload that was shipped from us by Canned Goods Shippers, as our agents, to the Acme Distributing Company, Tempe, Arizona, care of the American Consolidators, Los Angeles, California, who would forward the shipment from Los Angeles to Tempe. This is a receipt for that.

Q. I see. Now this Can-Go?

A. Our company is a member of that association.

(Testimony of T. J. Gavin.)

Q. And would shipments contain their name if received in this area?

A. Whose name, Can-Go?

Q. Can-Go.

A. Not necessarily, because in this particular case their carrier was West Coast Fast Freight to Los Angeles, and they have put on here, "Care of the American Consolidators," who are another pool car shipper, and they would take care of the shipment from Los Angeles to Arizona.

Q. Now, with respect to Government's Exhibit 34 in evidence, can you tell whether that draft was on a certain person, who the shipment was made to?

A. Except for the fact it is a different quantity and a different valuation, it is identical. It is a different date. This date was—here is the shipping date, June 28, 1954. [237]

Q. That is Exhibit 34?

A. Exhibit 34. Shipped June 28th. Shipped the same date, two different enclosures, went in the same truck, shipped on the same date from Seattle.

Q. This shipment was to whom?

A. It is the same consignee, same shipper, care of American Consolidators, Los Angeles, to Acme Distributing Company, Tempe, Arizona, and it is properly made out.

Q. And these signatures down here?

A. That is the secretary of the Can-Go Shipping Association, who signed all of those.

Q. Now, in regard to plaintiff's Exhibit 35?

A. This is a similar set of papers. It covers a

(Testimony of T. J. Gavin.)

shipment of a different quantity, and different valuation, on June 19th, which was the first shipment we made to them.

Q. What year?

A. It is also shown, same routing.

Q. What is the year? A. 1954.

Q. And who is it to?

A. Shipped to Acme Distributing Company, Tempe, Arizona, care of American Consolidators, at Los Angeles, and it is properly signed, a similar document right down the line.

Q. All of these three exhibits have this original draft on. Can you explain the reason for that? [238]

A. You mean why that is here?

Q. That is right.

A. Well, ordinarily, we rarely get these back. The original draft that goes to the bank for the customer to pay it, the customer would have the draft to be paid. The reason we have these is because he didn't pay it.

Q. Are these, to your knowledge, the shipments made to Acme Distributing Company by your company?

A. That is exactly the shipments, yes.

Q. These are the shipments?

A. Yes.

Q. Who was your agent for these shipments, or who contracted the shipments?

A. You will have to ask that a little differently, because we don't have any agent contracting for us.



(Testimony of T. J. Gavin.)

Q. Did you contact Mr. Ben Hoffman directly in regard to this shipment?

A. I never have, no.

Mr. Whitney: What was that answer?

The Witness: I never have, no.

Q. (By Mr. Eubank): Who did contact Mr. Hoffman?

A. We were working with a broker in Spokane, Washington. We have brokers in many places throughout the United States.

It so happens in Spokane, Washington, we were working [239] with a broker known as Grant-Whitman, who are engaged as food brokers, selling for various people, and this business was first offered to us by him through phone calls or orders he had received from Acme Distributing Company.

Q. Who did you talk to in particular in Grant-Whitman Company? A. Mr. Jack Ehlinger.

Q. And as far as the terms of payment were concerned, those documents there, do they contain the terms of payment as conveyed to you by Grant-Whitman Company?

A. Those drafts are drawn payable ten days after date of shipment, and that was the basis upon which the goods were sold.

Q. Now, let's see. Looking at these freight bills, can you tell us the total amount shipped, and the cost? I mean, the charge that you made?

A. You mean the amount of our invoices?

Q. That is right.

(Testimony of T. J. Gavin.)

A. The first invoice is for an amount of \$8,289.99.  
That covers——

Q. That is all right. Just the total amount.

A. 350 cases of canned salmon.

Q. Okay. That is on exhibit 35?

A. 35.

Q. Now, in regard to exhibit 34? [240]

A. 34, that covers 200 cases of canned salmon, and 100 cases of canned crabmeat, and the total amount of that invoice is \$6,824.58.

Q. And in regard to Government's Exhibit 33?

A. That covers a total of 200 cases of canned salmon. Pardon me, a total of 300 cases of canned tuna fish, and the total amount of the invoice was \$4,423.45.

Q. Have you ever collected any of the money represented by these billings?

A. No, we have never collected any of the money of those invoices.

Q. Did you ever recover any of the goods, any of the salmon, the shipped fish?

A. None of the salmon, no. I might mention, if it is a mere technicality, for some unknown reason he shipped back a good part of the small shipment of crabmeat made to him. We never did know why.

Mr. Eubank: No further questions.

#### Cross-Examination

By Mr. Whitney:

Q. Mr. Gavin, you operate from Seattle?

A. Right.

(Testimony of T. J. Gavin.)

Q. And these orders, or, rather, these bills and drafts in your name, being Exhibits 33, 34, and 35, which you are familiar with? [241]

A. Yes.

Q. These were orders placed with you by Grant-Whitman of Spokane?

A. They were submitted to us for our confirmation, correct. We confirmed them, we covered them by our usual sales contracts.

Q. I see. But the orders came to you through Grant-Whitman & Company?

A. That is right.

Q. And none of them came from Hoffman?

A. What?

Q. None of them came from Mr. Hoffman?

A. I didn't know who Mr. Hoffman was at the time. He was given to me as Acme Distributing Company. That is all I knew.

Q. Did anyone from the Acme Distributing Company call you up? A. They did not.

Q. In other words, all the dealings were done through Grant-Whitman Company?

A. I made mention to you that is quite the normal way the canned goods are sold. The buyer ever rarely contacts anyone like us. They contact a broker in the field, and the broker sends them to us, and that is normal.

Q. That is done in the regular course of business? [242] A. That is correct.

Q. The only point I make, you had no direct contact with Acme Distributing Company ?

(Testimony of T. J. Gavin.)

A. No, we had no direct contact with Acme.

Q. You say you haven't been paid anything by Mr. Hoffman?

A. By Acme Distributing Company.

Q. You have a suit pending in this court for the amount of those bills?

A. I say we have not been paid anything.

Q. You have got a suit pending in this court for that bill, a civil suit, isn't that right?

A. We have? I can't say we have one pending. You mean a civil suit?

Q. One was filed, wasn't it?

A. Yes, a civil suit is being prepared, that is correct.

Q. In other words, you were transacting credit business, and didn't get paid, and finally had to sue for your money, and haven't been paid yet?

A. We haven't been paid yet, no.

Q. The suit has never been determined yet, the civil suit?

A. I can't answer that to you. I think that is an improper question, because the suit hasn't been filed. It hasn't been determined, no.

Q. Are you acquainted with a law firm in Seattle by the [243] name of Nixon & Hove?

A. Sir?

Q. Are you acquainted with a law firm called Nixon & Hove?      A. Yes, I know them.

Q. Are they your attorneys?

A. Well, they have handled some business for us at times.

(Testimony of T. J. Gavin.)

Q. You know they had written out here in connection with this bill?

A. I would have to identify it before I would say I know about it. I don't know what you might be referring to.

Q. You didn't know that they threatened that if they didn't collect this bill they would turn it over to the Federal Government?

A. I question that very much. No, I don't believe they did. I would say they did not do it, very definitely. I don't ever remember any such matter.

Mr. Whitney: Mark this for identification, please.

The Clerk: Defendant's Exhibit C for identification.

(Said document was marked as Defendant's Exhibit C for identification.)

Q. (By Mr. Whitney): Mr. Gavin, referring to Defendant's Exhibit C for identification, you are acquainted with Mr. Nixon's signature?

A. Yes. I would be safe in saying that was his signature, yes. [244]

Q. You stated that you were sure he had never said anything about if he didn't collect this bill, he was to put this in the hands of the Federal attorneys?

A. Wait a minute. You asked me a question, and I answered it. You said was I familiar with the fact that he threatened that if it wasn't paid he would

(Testimony of T. J. Gavin.)

turn it over to the Federal authorities, and I answered no I wasn't.

Mr. Whitney: Will you read that last, please?

(Record read, as requested.)

The Court: That isn't in evidence, is it?

Mr. Whitney: I will offer it in evidence.

Mr. Eubank: I object to its being admitted.

The Court: Yes. I don't see what it has to do with this. Objection sustained.

Q. (By Mr. Whitney): Of course, I realize you are not responsible for what your attorneys made, right?

A. Well, I wouldn't say that entirely I am familiar with it sometimes. I answered your question, and I am sure that I think I answered it correctly.

Q. Inasmuch as this bill was, or rather, this order was put in for Grant-Whitman and Company of Spokane after Hoffman, or the Acme declined to pay for the canned goods, did you have a settlement with Grant-Whitman in connection with the matter?

A. Well, you must understand our relationship with [245] Grant-Whitman Company.

Q. What is it?

A. They were to be paid a sales commission by us on completion of this sale, and like we do with any of our other brokers, there was never any settlement with them, there was no commission paid them, because the transaction wasn't completed. This buyer didn't pay for his merchandise.

(Testimony of T. J. Gavin.)

We never got our commission from our canner. All we have been out is a number of thousands of dollars. As far as Grant-Whitman is concerned, they have been put to considerable expense and a very complete investigation of the whole thing. There was no settlement. There was no earnings, in other words.

Q. They haven't settled with you in any way?

A. Who would settle with me?

Q. Grant-Whitman.

A. They would have no reason to settle with me. If the sale had been completed, we would give them a commission check for the sale they made for us.

Mr. Whitney: That is all.

The Witness: Is that all?

Mr. Whitney: Yes.

Mr. Eubank: One further question.

### Redirect Examination

By Mr. Eubank: [246]

Q. The case that you were referring to, and counsel referred to in the civil court, is that against Mr. Ben Hoffman, or against another person?

A. All I can say, I wouldn't want to say anything that is incorrect, because as far as I know the attorneys we have retained, they may have filed it. Really, I can't say that, but it is a conspiracy, that is, it is against Acme Distributing and Ben Hoffman, and two people by the name of Keeton, who operate super-markets, and we had quite an investigation made tracing the goods where they went.

Mr. Eubank: That is all. No further questions.

The Court: That is all now for Mr. Gavin?

Mr. Whitney: Yes.

The Court: That will be all.

(Witness excused.)

The Court: The Court will recess until ten o'clock in the morning.

(Whereupon, Court was adjourned to the following day, September 20, 1956.) [247]

Thursday, September 20, 1956—10 A.M.

Before Judge Ling and a Jury.

Court convened pursuant to adjournment.

Present:

Mr. Eubank, appeared for Government.

Mr. Whitney, Mr. La Prade, appeared for Defendant.

The Court: Call your next witness.

Mr. Eubank: Mr. O. E. Sexton.

O. E. SEXTON

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is O. E. Sexton?

A. Yes, sir, it is.



(Testimony of O. E. Sexton.)

Q. And you are a fruit stand operator?

A. Yes, sir.

Q. Operating as Ed's Fruit Stand?

A. Yes, sir. [248]

Q. At 1745 East Apache? A. Yes, sir.

Q. And that is in Tempe? A. Tempe.

Q. Now, Mr. Sexton, do you know the name of Ben B. Hoffman? A. Yes, sir.

Q. Do you know the name of Acme Distributing Company? A. Yes, sir.

Q. Do you recognize Mr. Hoffman in this courtroom this morning? A. Yes, sir, I do.

Q. Will you point him out to the jury?

A. Right in the back seat (indicating.)

Q. Right here? A. Yes, sir.

Q. In relation to Mr. Hoffman and dates, did you purchase any dates from Mr. Hoffman?

A. Yes, sir, I did.

Q. Do you recall the types of dates?

A. Well, sir, Adeglis-Norris is all I know.

Q. Do you recall when you purchased these dates, approximately?

A. Well, approximately in December, 1954.

Q. I show you Government's Exhibits 25, 16, and 17 in [249] evidence, and ask you if you recognize these brands of dates? A. Yes, sir, I do.

Q. Do you recognize Government's Exhibit 17, this one?

A. This one, yes, sir, I do. I still have some of them.

Q. Do you recognize Government's Exhibit 16?

(Testimony of O. E. Sexton.)

A. Yes, sir, I had some of those.

Q. Do you recognize Government's Exhibit 25?

A. Yes, sir, I had some of those.

Q. Now, these types of dates, who did you buy them from? A. Mr. Hoffman.

Q. Did you buy them from anyone else?

A. No, sir, I didn't.

Q. Do you recall the price that you paid for those dates?

Mr. Whitney: I object to it as immaterial.

The Court: He may answer.

Q. (By Mr. Eubank): Do you recall the price you paid for those dates?

A. Well, not specifically. I paid approximately 10 to 12c a pound.

Q. How do you know that, Mr. Sexton?

A. Well, I was looking at the dates at the time. If I hadn't have known what I paid for them, I wouldn't have bought them.

Q. And it is your testimony that you wouldn't have exceeded that amount in payment, is that correct? [250]

A. Well, no, sir. I wouldn't, because I could have bought dates for the same price, or cheaper.

Q. Where? In this area? A. Yes, sir.

Mr. Eubank: No further questions.

Mr. La Prade: No questions.

The Court: That will be all.

Mr. Eubank: May this witness be excused?

The Court: He may be.

(Witness excused.)

Mr. Eubank: I will call Bill Clark.

WILLIAM CLARK

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is William Clark?

A. That is right.

Q. And you are the operator of Clark's Dates?

A. Clark's Citrus and Dates.

Q. At 4803 East Thomas?

A. That is right.

Q. In Phoenix, Arizona? A. Yes.

Q. As I understand it, Mr. Clark, you are both  
a retail [251] seller and a grower?

A. Yes, sir.

Q. And you have your own date gardens?

A. Yes.

Q. And you also package dates? A. Yes.

Q. Now, do you recognize the name of Ben B.  
Hoffman? A. Yes.

Q. Or Acme Distributing Company?

A. I don't know anything about Acme Distribut-  
ing Company.

Q. Do you see Mr. Hoffman in this courtroom?

A. Yes.

Q. Can you point him out to the jury, please?

A. Yes.

Q. Would you? A. (Witness indicates.)

(Testimony of William Clark.)

Q. And describe him so they will know who you are referring to?

A. Sitting over there in the brown coat and striped tie.

Q. Now, Mr. Clark, in regards to Mr. Hoffman, did he attempt at any time to sell you any dates?

A. Yes, he did.

Q. What date was that?

A. It was along in November of 1954, the way I remember it.

Q. And do you recall the name of the brand, the brand [252] name of the particular date?

A. It was Long's dates, and some Gold Cup date packs out of California.

Q. I show you Government's Exhibits in evidence 6, 17, and 16, and ask you if you recognize these exhibits. First, Government's Exhibit 16 in evidence? A. This one I didn't see here.

Q. You didn't see that one. Government's Exhibit 17 in evidence? A. This one I did.

Q. You saw that one. And Government's Exhibit 6 in evidence? A. And this one.

Q. Now, in regard to those particular dates, did you purchase any of those? A. No, I didn't.

Q. From Mr. Hoffman. What was the price he quoted for these particular dates?

Mr. Whitney: Just a minute.

The Court: He may answer.

The Witness: As I remember, it was around 12c a pound.

Q. (By Mr. Eubank): You said that you were

(Testimony of William Clark.)

a grower and operator of dates, was there any reason that you, or was that price similar to [253] the market at that time?

A. Well, the price was a whole lot lower than the existing market, but I didn't buy them because I raise Arizona dates, and I don't handle California dates unless I have to.

Q. You say it was lower than the Arizona market? A. Yes.

Q. Was the date itself lower the Arizona date?

A. Well, every Arizona date grower considers Arizona dates superior to California dates, because we just raise more softer varieties, and mostly it is a hydrated date in California.

Q. At that time, do you recall what the Arizona market was for a similar date?

A. I was getting around 45c a pound retail for what we call a commercial date in a one-pound berry basket.

We have a gift grade, No. 1 fancy grade, which brings a lot more than that, but our commercial grade that compares with that was 45c a pound.

Q. In regard to the packaging of a date like that, is it possible to buy dates in bulk at a much lower figure than in package? A. Yes, it is.

Q. Now, assuming that, well, at the market at that time, what could you have bought bulk dates for, for a heavy quantity?

Mr. Whitney: I object to that as [254] immaterial.

(Testimony of William Clark.)

The Court: Yes, what difference does it make?

Q. (By Mr. Eubank): As a result of the conversation with Mr. Hoffman, did you purchase any merchandise from him?

A. I bought some Christmas candy, hard candy from him, and some dried fruit packs.

Q. Did you make any other purchases from Mr. Hoffman? A. No, that was all.

Q. And did you make any before that time, that you recall?

A. I think he was there two different times, but actually it was only one purchase.

Q. Did he offer any type of a selling arrangement with you?

A. He offered to leave a lot of stuff on consignment.

Q. And did you accept that proposition?

A. No.

Mr. Eubank: No further questions.

Mr. Whitney: No questions.

The Court: That will be all.

(Witness excused.)

Mr. Eubank: The next witness is Bill Allen.

BILL ALLEN

called as a witness in behalf of the Government,  
having been first duly sworn, testified as [255]  
follows:

Direct Examination

By Mr. Eubank:

Q. You are Mr. Bill Allen? A. Yes, sir.

Q. And you are the foreman of the Crystal Ice  
Plant? A. Yes, sir.

Q. And the location of that plant is at 246  
South 2nd Avenue?

A. That is the office address.

Q. At Phoenix, Arizona? A. Yes.

Q. Where is the warehouse located?

A. Did you say 242 or 246?

Q. 246. A. 246 is the warehouse.

Q. And is that the place that you are stationed?

A. Yes, sir.

Q. Now, in your capacity as the foreman of  
Crystal Ice, what records do you keep?

A. Complete.

Q. What type of records?

A. Well, both incoming and outgoing records.

Q. And that pertains to what type of storage?

A. Either freezer items, or cooler items.

Q. And a customer of your warehouse, would you  
explain to the jury what happens to his product  
when it is delivered into [256] your hands?

A. Well, the customer brings the material or  
merchandise in, and I write him a receipt for it and

(Testimony of Bill Allen.)

store it, whether it be freezer or cooler, and issue it out to the customer as he comes in for it.

Q. And when the customer comes and picks up the stored items, how does your record acknowledge that he has received the items?

A. By his signature.

Mr. Whitney: I beg your pardon?

The Witness: By the customer's signature.

Q. (By Mr. Eubank): Now, you are here this morning under a subpoena duces tecum, is that correct? A. Yes, sir.

Q. And we asked you to bring the records that you had pertaining to Mr. Ben B. Hoffman and Acme Distributing Company? A. Yes, sir.

Q. Do you know Mr. Ben B. Hoffman?

A. I have done business with him quite a while.

Q. Do you see him in this room?

A. Yes, sir.

Q. Would you point him out to the jury, please?

A. (Indicating): It is the fellow in the brown coat and white shirt. [257]

Q. Now, in regard to the records that you brought with you, do you have specific records showing the storage of products by Mr. Hoffman? In particular, dates.

A. Were you interested in his incoming receipts, or outgoing tickets?

Q. Incoming receipts? A. Yes, sir, I have.

Q. Is the information on this receipt posted to that card? A. Yes, sir.

Q. And in the posting from this receipt to the



(Testimony of Bill Allen.)

card, is that done at the time, or the approximate time that the merchandise is put into your storage?

A. At my earliest convenience. It might possibly be three or four hours later.

Mr. Whitney: If the Court please, I wish to make an objection to all this line of testimony, on the grounds that it is incompetent to prove any issue in this case, and it is immaterial where they stored it.

The Court: I don't know a thing about it. We will find out.

Q. (By Mr. Eubank): If this is posted to those cards, let us just use the cards then.

A. All right, sir.

Q. Now, you have said that these postings are made at or [258] near the time that the goods are received, is that correct?

A. At my earliest convenience.

Q. Do these cards reflect, to your knowledge, the true transactions, as far as the storage of the materials?

A. Yes, sir, they do.

Q. And they are part of your company records?

A. They are.

Q. And they have been in your custody, is that correct?

A. Yes, sir.

Q. Now, will you give me the ones that deal with dates?

A. That would be those four there, would be dates.

Q. May these cards be marked Government's Exhibits 36, and 36-A to F for identification?

(Testimony of Bill Allen.)

A. That is not complete. Here is more of the same.

Q. Are there more dates?

A. That is dates and candies. Dates and candied fruits.

The Clerk: Government's Exhibits 36, and 36-A to G, inclusive, for identification.

(Said documents from Crystal Ice were marked as Government's Exhibits 36, 36-A to G, inclusive, for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibits 36, 36-A through 36-G, inclusive, and ask you if you can identify those cards?

A. Yes, sir, I can. [259]

Q. How can you identify them?

A. It is in my own writing.

Q. And were these the ones you brought with you this morning?

A. They are, yes.

Q. And these are what documents, as far as your company is concerned?

A. I wouldn't say that it was complete. I didn't have time enough to compile everything, but that will cover the larger part of it.

Q. You are referring to the number of cards taken out of the files, is that correct?

A. Yes.

Q. But as far as the information on these, the information, is it complete, the information on each card?

A. I believe that part of it would be complete, but as far as his outgoing tickets are concerned, I

(Testimony of Bill Allen.)

wouldn't have his signatures on everything he received.

Mr. Eubank: I offer Government's Exhibits 36, and 36-A through 36-G, inclusive, in evidence.

Mr. Whitney: May I ask one question?

The Court: Yes.

Mr. Whitney: Do you know, Mr. Witness, where these dates came from?

The Witness: Sir? [260]

Mr. Whitney: Do you know where these dates came from?

The Witness: No, I couldn't say that.

Mr. Whitney: If the Court pleases, some of these exhibits go to dates that are completely without the dates in the Indictment. We object to them on the further grounds that they are incompetent to prove any issue in this case, and are wholly immaterial.

This I am referring to as Government's Exhibit 36 for identification.

Mr. Eubank: This will serve several purposes, your Honor. One is identification further of Ben Hoffman. It will serve that because the next documents that relate to these particular records of original entry are all signed by Mr. Hoffman as Acme Distributing Company. The dates also are in proximity of the shipments from both Long and C. A. Glass, and I think that it will tie in.

The Court: Go ahead. We will see what you have when you get through.

(Testimony of Bill Allen.)

The Clerk: Government's Exhibits 36, and 36-A to G, inclusive, in evidence.

(Said documents from Crystal Ice were marked as Government's Exhibits 36, 36-A to G, inclusive, in evidence.)

Q. (By Mr. Eubank): I show you Government's Exhibits in evidence 36, and [261] 36-A through G, and ask you from this document if you can identify several outgoing receipts in your book?

A. Yes, sir. Between those cards and these, I have 16 transactions, through the month of November of 1954.

Q. So all outgoing dates marked here, you can find them in there, is that correct?

A. Yes, sir.

Q. Now, for example, we don't want to take all of these, but let us take a couple of them, anyway. Is this the outgoing date? A. Yes, sir.

Q. Let us try this, November 9th, 1954?

A. Ticket No. 1331.

Mr. Eubank: All right.

The Court: What are you referring to now? Is that book in evidence?

Mr. Eubank: Yes, I was going to have him choose several of these at random, and then we would enter those in evidence.

The Court: All right.

Q. (By Mr. Eubank): All right, let us take another card here. First, in referring to Government's Exhibit 36 in evidence, this number, this outgoing

(Testimony of Bill Allen.)

receipt, how do you go from your card here to your outgoing receipts?

A. Well, I take into consideration your lot number here, [262] 1195. 1195 consisted of 25 cases——

Mr. Whitney: Just a minute, has that been marked for identification yet, so we know what we are talking about?

Mr. Eubank: I am having him pick a couple of these, so we can mark them for identification. I didn't want to enter the whole book. Is that satisfactory, Mr. Whitney?

Mr. Whitney: I guess so.

Mr. Eubank: Then we won't be bothered with so many of these things.

Q. (By Mr. Eubank): What about this number here? A. That is the one I have here.

Q. Is that the way you identify the transaction?

A. Yes, sir.

Q. What would you call that number?

A. That is the outgoing ticket number.

Q. Now, in regard to this card, what is the card number? A. 1196.

Q. That is Government's Exhibit 36. Now, would you find this ticket number? A. Yes.

Q. Now, would it be your testimony, if we went on through these things, and through all of these folio numbers, we would find a receipt in there in numerical order, is that correct?

A. I believe you would, yes. [263]

Q. Would you, or wouldn't you?

A. Well, I didn't have time enough to go through

(Testimony of Bill Allen.)

all of those records. I was only notified after five o'clock last night. But the bigger part of them you will find listed in this book here.

Mr. Eubank: I would like just these two receipts marked as Government's Exhibits 37 and 38 for identification, 1331 and 1338.

The Clerk: Government's Exhibits 37 and 38 for identification.

(Said Delivery Record Sheets were marked as Government's Exhibits 37 and 38 for identification, respectively.)

Q. (By Mr. Eubank): I show you Government's Exhibits 37 and 38 for identification, and ask you if you recognize these documents?

A. I do.

Q. Now, Government's Exhibit 37, you recognize that document?      A. Yes, sir, I do.

Q. How do you recognize it?

A. I recognize it by my own handwriting, and the customer's name.

Q. And is this the form that your company uses?

A. Yes, sir, it is. [264]

Q. And are they still using it?

A. Yes, sir.

Q. I show you Government's Exhibit 38 for identification, and ask you if you recognize that document?      A. I do.

Q. And how do you recognize this document?

A. By my handwriting, the customer's signature.

Mr. Eubank: Now I ask that Government's Ex-

(Testimony of Bill Allen.)

hibits 37 and 38 for identification be entered in evidence.

Mr. Whitney: If the Court please, we make the same objection to Government's Exhibit 37 for identification and 38 for identification that was made to Government's Exhibit 36 for identification, with the further objection that there appears items on here that don't relate to dates at all. For instance, candy and fruit.

The Court: Well, does it show any dates on there?

Mr. Eubank: Yes, sir, on Government's Exhibit 37 for identification, there are one, two, three, four date entries. One of them is four cases of 12 3-pound, 38 cases of 1-pound, 1 five-pound, and four, what would that be besides four something dates. That is in regard to Government's Exhibit 37.

In regard to Government's Exhibit 38, there are 25 cases of 24 1-pound's, 50 cases of 12 3-pound's, and 20 cases of 24 eight, dates with cocoanut, cases of 24, eight.

Mr. Whitney: They are not identified with any particular [265] dates.

The Court: Were those withdrawn from storage, or placed in storage?

Mr. Eubank: This is the withdrawing receipt.

Mr. Whitney: It is immaterial.

The Court: Do you have the others that show the deposit?

Mr. Eubank: Yes, sir, the original entry shows the deposit.

(Testimony of Bill Allen.)

The Court: How can you tie the two together?

Mr. Eubank: Well, the two are tied together by these numbers, the receipt number.

The Court: Do they correspond?

Mr. Eubank: That is right, sir.

The Court: All right.

The Clerk: Government's Exhibits 37 and 38 in evidence.

(Said Delivery Record Sheets were received in evidence and marked as Government's Exhibits 37 and 38, respectively.)

Q. (By Mr. Eubank): Now, I show you Government's Exhibits 37 and 38 in evidence, and ask you if you recognize the customer's signature?

A. I do, yes, sir.

Q. In regard to Government's Exhibit 37 in evidence? A. Yes, sir.

Q. And in Government's Exhibit 38 in evidence?

A. I do, yes. [266]

Q. And what signature is that?

A. That is Benjamin H, I believe, Hoffman. Ben Hoffman.

Q. Now, did this, did the person that signed this sign these before you? A. Yes, sir.

Q. Is that gentleman the same one that you identified to the jury earlier?

A. Yes, the same.

Mr. Eubank: No further questions.

Mr. Whitney: No questions.

(Witness excused.)



Mr. Eubank: As the next witness, I would like to call Mr. Jack Ehlinger.

JACK J. EHLINGER

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is John J. Ehlinger?

A. That is correct.

Q. And you are with the Grant-Whitman Company?

A. Yes, sir.

Q. In what capacity was that?

A. I was the manager.

Q. That company is located on Gray [267] Avenue?

A. Yes.

Q. Spokane, Washington?

A. Spokane, Washington.

Q. How long have you been with the Grant-Whitman Company?

A. Since its foundation. I helped to organize the company.

Q. Do you recognize the name of Ben B. Hoffman?

A. Yes, I do.

Q. Do you recognize the name of Acme Distributing Company?

A. Yes, I do.

Q. Have you ever met Mr. Hoffman personally?

A. No, I haven't.

Q. In regard to Mr. Hoffman, how did you personally learn of the name?

(Testimony of Jack J. Ehlinger.)

A. I first learned of the name through a collect phone call, and while I had my records, as I recall, the first call was on June 14th of 1954.

Q. Do you have a record whereby you could tell the exact date of that phone call?

A. Oh, yes, may I get them? I can identify those, but I have a record in my briefcase, likewise.

Mr. Eubank: Would you mark these Government's Exhibit 39 for identification?

The Clerk: Government's Exhibit 39 for identification.

(Said telephone bills were marked as Government's Exhibit 39 for identification.) [268]

Q. (By Mr. Eubank): I show you Government's Exhibit 39 for identification, and ask you if you recognize that document?

A. Yes. You will notice that I marked——

Q. Wait a minute. How do you recognize the document?

A. It is an original receipted bill from the Pacific Telephone and Telegraph Company.

Q. Who was the bill to?

A. It was billed to Grant-Whitman Company.

Q. Are there any distinguishing marks on the thing that identify it as the bill?

A. Specifically, from a tie-in with our records, of which you have a record, and the dates of these calls which it will show I marked for Phoenix, we have done no business in Phoenix other than these transactions.

(Testimony of Jack J. Ehlinger.)

Q. Now, look at the other pages of the document there and make sure that it is all the same.

A. No calls on this page. But they are marked as to date. There are two calls on this page, on June 18th.

There are several calls on this page, June 19, June 23, and again on June 17th.

Q. And the calls listed in this relate to the calls or call from whom?

A. From Mr. Hoffman.

Mr. Whitney: You mean calls from people who said they [269] were Mr. Hoffman, is that what you mean? You have never talked to him?

The Court: Don't debate that now.

Mr. Eubank: I offer Government's Exhibit 39 for identification in evidence.

Mr. Whitney: Objection on the grounds that a telephone call with the person calling has not been properly identified.

The Witness: May I add something?

The Court: No, be quiet. Answer the questions asked you.

It may be received.

(Said telephone bills were received in evidence and marked as Government's Exhibit 39.)

Q. (By Mr. Eubank): Now, I show you Government's Exhibit 39 in evidence, and ask you if you can state the exact dates? Fix the exact date of your first call.

A. The date of the first call was June 14th.

(Testimony of Jack J. Ehlinger.)

Q. That was from whom?

A. It was from a man that represented himself as Ben Hoffman of the Acme Distributing Company.

Q. And by referring to that toll slip, can you tell us the place from which that call was placed?

A. That was placed from Phoenix.

Q. And did you receive any calls subsequent to that time from the same person? [270]

A. I did.

Q. Would you please give the jury the dates of those calls, and whether they were collect or prepaid.

A. On June 14th, we received a call from Phoenix. On June 21st——

Q. Was that collect or prepaid?

A. These were all collect.

On June 21st, we received two calls from Phoenix, and those can be explained. On June 19th we received a call from Phoenix.

On June 23rd we received a call from Phoenix. On June 17th we received a call from Phoenix, and on June 18th, two calls from Phoenix. And several of these calls——

Mr. Whitney: I object to any calls outside of the call on June 14, 1954, charged in the Indictment.

The Witness: I requested Mr. Hoffman——

Mr. Eubank: No, pardon me. I will ask the questions.

The Witness: Pardon me.

Q. (By Mr. Eubank): With regard to these

(Testimony of Jack J. Ehlinger.)

calls, did you receive any other telephone calls from Mr. Hoffman?

A. No, not to my knowledge.

Q. Now, regarding the first telephone call on June 14th, would you relate to the jury how the person represented himself? First, who he was and who he represented? [271]

A. The person represented himself——

Mr. Whitney: Wait a minute, I object on the grounds that the caller has not been identified. They have not put in any evidence from what phone this was from, except that he said so and so.

The Court: The caller said he was Hoffman. Isn't that true, Mr. Witness?

The Witness: Yes, sir.

The Court: All right, go ahead.

Q. (By Mr. Eubank): Now, explain just how he identified himself.

A. He identified himself as Mr. Hoffman of the Acme Distributing Company.

Q. Where? A. At Tempe, Arizona.

Q. Now, in regard to that, what did he inquire about?

A. He was inquiring for prices of salmon, and as a broker, we, of course, would check with our source of supply, and I told Mr. Hoffman——

Mr. Whitney: Wait a minute, not what you did, but what Mr. Hoffman did.

The Court: He is telling what he told Mr. Hoffman. Go ahead.

The Witness: I told Mr. Hoffman we would

(Testimony of Jack J. Ehlinger.)

Q. Yes.

A. Would you like to have me present it to you?

Q. Could we remove this? A. Yes.

Q. How was this copy of this telegram come about? How did you get this copy of the telegram?

A. Any wires that we transmit, we retain copies for our office records.

Mr. Eubank: I would like to have this marked as Government's Exhibit 40 for identification.

The Clerk: Government's Exhibit 40 for identification.

(Said copy of telegram was marked as Government's Exhibit 40 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 40 for identification and ask you if you recognize this document? A. Yes, I do.

Q. Is that the document you were just describing to us? A. Yes, it is.

Q. How do you recognize it? [275]

A. Well, I recognize it in several methods. In the first place, I dicatated it. In the second place, you will notice Western Union Night Letter, Paid, addressed to Acme, in this instance at his Arizona address.

I recognize it from the reference to the phone conversation, and the quotation on the commodity that we transmitted to Arizona.

Q. Will you tell the jury the possession of this document?

(Testimony of Jack J. Ehlinger.)

A. This document has been in my possession, of course, since it was transmitted. The original, of course, is in Mr. Hoffman's possession.

Mr. Eubank: I ask that Government's Exhibit 40 for identification be entered in evidence.

Mr. Whitney: We object to it, that it is not an event recited in the Indictment charged.

The Court: It may be admitted.

(Said copy of telegram was received in evidence and marked as Government's Exhibit 40.)

Q. (By Mr. Eubank): Now, showing you Government's Exhibit 40 in evidence, I ask you, will you read to the jury the terms that are contained in the telegram?

A. Shall I just read the telegram?

Q. Yes, just read that.

A. We say "Re phone," in other words, the original conversation. [276]

Q. That is all right.

A. "Endeavoring to locate pinks," that is pink salmon. "——which extremely scarce. Can offer good quality Reds talls 27.50 have Halves Reds 18.00 case fob Seattle prompt shipment wire reply."

Q. Now, did a reply come by wire?

A. No, we had no reply other than by phone.

Q. Now, this phone call, which in number was this? Was this the second phone call from him?

A. That would be the second phone call.

Q. In regard to that phone call, will you relate the conversation with Mr. Hoffman at that time?

(Testimony of Jack J. Ehlinger.)

A. As nearly as——

Mr. Whitney: Is that the phone call of June 14th?

Mr. Eubank: This is the next phone call.

The Witness: What is the date of that wire?

Q. (By Mr. Eubank): I show you Government's Exhibit 39 in evidence.

A. It would be on June 15th.

Q. Now, in regard to the conversation with Mr. Hoffman on that day, what was said? First, how did he identify himself again?

A. He identified himself as Mr. Hoffman, and I recall this quite specifically. Let me go back. Mr. Hoffman [277] acknowledged the transmission of these prices, because he said that the prices were satisfactory, and to ship a specific quantity of Tall Reds.

Q. Do you recall the specific quantity?

A. I believe on that first shipment, yes, I can tell you that exactly.

Q. Can you tell us by referring to your memorandum?

A. From our sales memorandum?

Q. Yes. A. Yes, I could.

Q. Would you mark this Government's Exhibits 41, 41-A, B, C, and D for identification?

The Clerk: Government's Exhibits 41, 41-A, B, C, and D for identification.

(Said Sales Memos were marked as Government's Exhibits 41, 41-A, B, C, and D for identification.)



(Testimony of Jack J. Ehlinger.)

Q. (By Mr. Eubank): I show you Government's Exhibits 41, 41-A, B, C, and D, and ask you if you recognize these documents?

A. Yes, I do. This is the memorandum——

Q. Just a minute. How do you recognize those documents?           A. How?

Q. Yes.

A. They are our uniform memorandum of sale.

Q. Is this the form of your company? [278]

A. This is the form we utilize in transmitting orders.

Q. And in this particular case, is there any other identifying feature on there that you are able to recognize?

A. We always show Sold for the Account of a specific shipper, which was Gavin, Buyer's Purchase Order Number. Hoffman-phone.

Q. Will you please relate to the jury how these records are used in the set-up of your company?

A. These records are transmitted, we maintain copies, of which this happens to be a copy of that transaction.

The original goes to the shipper. The shipper, if he accepts the business, fills in the basis of the information on our Sales Memorandum. Then to identify our Sales Memorandum with that shipment, we receive a copy of the invoice back from the shipper, and you will notice Number 101 is tied in to Mr. Gavin——

Q. Just a minute.

A. Pardon me.

(Testimony of Jack J. Ehlinger.)

Q. And where are these records kept in relation to your office? In what kind of filing order?

A. I don't think I understand.

Q. In the files of your company, how are these records kept?

A. These records are kept, these sales are kept under the name of the party to whom sold. [279]

Q. And how long are they retained?

A. We retain those records for several years.

Q. And will you look at each of the documents separately, now, and see if your testimony, as you have identified the first one, relates to, for example, 41-A.        A. 41—

Q. This is 41. Now looking at 41-A for identification, does it relate to 41-A? I mean is that the same type of document?

A. Yes, it relates identically to each document.

Q. All right, now, 41-B?

A. 41-B is related to 41 and 41-A in the same manner.

Q. The same document?

A. Same type of document, yes.

Q. And 41-C?        A. And 41-C the same.

Q. And 41-D?

A. 41-D is different. 41-D is an invoice.

Q. Will you explain to the jury how that differs from the Sales Memorandum?

A. It differs from the Sales Memorandum in this respect. These documents were transmitted to a canner on the coast for whose account we sold on a commission basis. This document is an invoice from

(Testimony of Jack J. Ehlinger.)

Grant-Whitman Company on merchandise that we ourselves sold. [280]

Q. And do you recognize this document?

A. Yes, sir, I do.

Q. How are those kept in your company?

A. They are kept in the same manner.

Q. I notice this is a copy. Where would the original of that be?

A. The original would be in the hands of Mr. Hoffman.

Mr. Eubank: I ask that Government's Exhibits 41, and 41-A through 41-D be admitted.

Mr. Whitney: May I ask a question on voir dire?

The Court: All right.

Q. (By Mr. Whitney): Referring to Government's Exhibit 41, Mr. Ehlinger? A. Yes, sir.

The invoices under date of 6/15/54?

A. Right.

Q. Was in relation to the so-called phone call you had, is that right? A. That is right.

Q. And that is the phone call you had on June 14th?

A. It is actually, you will notice June 15th, the phone on June 15th resulted in this particular transaction, that is correct.

Q. But the other transactions were no relation to the first phone call? [281]

A. They were subsequent transactions.

Q. Subsequent transactions? A. Yes.

Mr. Whitney: I object, if the Court pleases, to

(Testimony of Jack J. Ehlinger.)

anything except Invoice No. 101, dated June 15th, 1954, on the grounds that the others are not properly identified, and have nothing to do with the charge in the Indictment.

The Court: Objection overruled.

The Clerk: Government's Exhibits 41, and 41-A through 41-D, in evidence.

(Said Sales Memos were received in evidence and marked as Government's Exhibits 41, 41-A through 41-D.)

The Court: We will have our morning recess at this time.

(The morning recess was had.)

The Court: You may continue.

Q. (By Mr. Eubank): I show you Government's Exhibits 41, and 41-A through 41D, and also Government's Exhibit in evidence 39, and ask you as far as your Sales Memos are concerned, can you relate the sales memos to phone calls received from Mr. Hoffman?

A. Yes. You will notice that we show in a box how the order originated. It would either be by letter, by wire, or *here* Hoffman by phone.

Q. That is Exhibit in evidence 41, and that was by phone. [282] And referring, then, to Government's Exhibit 39 in evidence?

A. Well, you will notice here that when we completed this memo for transmission to the shipper, we date it on the day that that order was written up, which is June 15th.

So our memo is dated June 15th, and is cor-

(Testimony of Jack J. Ehlinger.)

responding to this Phoenix call of the same date.

Q. And it would be your testimony it was that phone call that related to——

A. That pertained to this business, yes.

Q. Now, Exhibit 41-A?

A. That date was on June 18th. And here we are, Phoenix call on June 18th.

Q. And your testimony would be that that phone call relates to this? A. To this 41-A.

Q. 41-A in evidence? A. Correct.

Q. And 41-B in evidence?

A. 41-B is dated 6-21.

Q. And that would relate to——

A. Would relate to phone call from Phoenix on the 16th.

Mr. Whitney: Pardon me. I didn't hear that last.

The Witness: Would relate to this phone call on June 21st.

Q. (By Mr. Eubank): In regard to 41-C, Government's Exhibit in evidence? [283]

A. 41-C, June the 26th. And referring to phone call—usually we date those the same day. Sometimes if we are busy, we make a note, and then write them up subsequently.

Mr. Whitney: Speak up, sir.

The Witness: I said, usually we date those on the day the order comes in.

Q. (By Mr. Eubank): And on the one of June 26th?

A. On June 26th, I don't find June 26th at the moment here.

(Testimony of Jack J. Ehlinger.)

Q. Okay. Then on the order of, say, Government's Exhibit 41-D?

A. On June 24th, our invoice was dated on June 24th, now.

Q. Can you relate that with one of the telephone calls in Government's Exhibit in evidence, is it 39?

A. 39. Here is the Phoenix call on June 23rd.

Q. Would it be your testimony that that call relates to this?

A. I would say yes, because we rendered the invoice the following day.

Q. All right. Now, going to the first, or the second call of Mr. Hoffman, well, the first call, did he state anything about his business character?

A. Yes, he did. He represented himself as being in the wholesale grocery business. [284]

Q. And did he make any other representations as to business in the first call, that you recall?

A. He referred to several firms as having done business with them, who we knew.

Q. And do you recall either of those firms he referred to?

A. I recall one in particular, because they are close friends of mine, and that is Soule-Gibbs, in San Francisco.

Q. And did you inquire as to his credit rating, or any item like that?

A. We did not.

Mr. Whitney: At what time was this, now?

The Witness: Pardon me?

Mr. Whitney: What time are we talking about?

(Testimony of Jack J. Ehlinger.)

**Mr. Eubank:** This is the first call.

The Witness: This is approximately June 14th.

**Q.** (By Mr. Eubank): Now, after you had notified Mr. Gavin, and received the information back as to what the price of these items would be, and you read the telegram to the jury. **A.** Yes.

**Q.** What were the payment terms?

**A.** That was discussed on the phone, and it was likewise discussed in letter form.

**Q.** And which telephone call was that?

**A.** Immediately on the first call we discussed terms. [285]

**Q.** All right, what were the terms?

**A.** The terms of the salmon industry are draft terms.

**Q.** Draft?

**A.** That means that the documents are transmitted to the buyer's bank. Because of the time in transit on the merchandise, the buyer is allowed normally up to ten days to pick that draft up at the bank.

**Q.** Now, what does the draft entail, what is a bank draft?

**A.** A bank draft is simply a document to which is attached the original invoice of the shipper, bills of lading and pertinent papers referring to the sale, and transmitted to the buyer's bank.

**Q.** Now, are you familiar with the use of that type of document with railroading?

**A.** Very much so.

**Q.** Now, when you forwarded the original draft

(Testimony of Jack J. Ehlinger.)

and the original bill of lading on a railroad shipment, what usually is the effect?

A. The effect usually is that the customer must lift those documents prior to the time he gets receipt of merchandise.

Q. And by lifting the documents, what do you mean by that?

A. Picking up his draft. He has to pay for that merchandise, and then he will take his original documents down to the freight company, who will release the merchandise. There [286] is a distinction there.

Q. All right, I will ask the questions.

Now, when things are motor trucked, particularly on the West Coast, is there a different procedure?

A. The procedure is quite similar, other than the fact that the customer can receive merchandise prior to having picked up the draft at the bank.

The reason for that is because of the elapsed time, and your general trucking program and policy procedure, unless the shipper would ship on what is known as an Order Bill.

Q. Now, for example, if the original bill of lading and the original draft were at a bank, we will say, in Tempe or Mesa, and this canned goods was trucked down here. A. That is correct.

Q. Is it possible to get the canned goods without picking up or lifting the bill of lading?

A. It is possible unless the truckers are instructed to hold the merchandise until the customer had brought in the original papers.



(Testimony of Jack J. Ehlinger.)

Q. Now, you have testified as to the terms, and it was ten days?      A. Ten days, yes.

Q. What does that mean?

A. That means that within ten days the customer comes to the bank with his check, and the bank releases the documents [287] to him. The bank then transmits that money to the shipper's bank in the northwest.

Q. Do you know of your own knowledge whether this money, in regard to the shipments identified here, was ever received?

A. I know definitely there was never any payment made.

Q. And have you ever received any commission for soliciting the business?

A. No, we haven't.

Q. Now, in regard to the second telephone call, the second collect telephone call from Ben Hoffman, or person by the name of Ben Hoffman, were any of the terms rediscussed at that time?

A. They were not only rediscussed, but we submitted in letter form outlining quite emphatically what the terms of sale were.

Q. Do you have a copy of that letter?

A. Yes, I believe I have.

Oh, here we are.

Q. You don't have the letter. In regards to the terms, your testimony is that you did discuss the terms?

A. We discussed the terms. In fact, we discussed the terms on each call.

(Testimony of Jack J. Ehlinger.)

Q. How did it?

A. The business that was accepted by Mr. Hoffman, everything being equal, was interesting to our shipper. We were interested in making the sale. When we felt that Mr. Hoffman would lift the first draft, the shipments came close together, a matter of a few days, the shipper concluded to ship the second lot. I don't believe he would have shipped the second lot had we not had that information from Mr. Hoffman.

Q. All right. Now, after the second phone call and the other phone calls, was there any discussion as to changes in terms?

A. No, there never was.

Q. What was the main character of the phone call? What was the phone call for?

A. The phone call was simply a means for the buyer, which in this case was Mr. Hoffman, to transmit his order for the merchandise.

Q. And at each of those calls, there was a new or a different order of merchandise?

A. A different order of merchandise, yes.

Q. And these documents contained in Government's Exhibits [291] 41, and 41-A through 41-D?

A. Represent the merchandise.

Q. Represent the merchandise ordered?

A. Represent the merchandise ordered.

Q. Would you read quickly from 41 through 41-D, the type of merchandise, and the quantity that was ordered?

(Testimony of Jack J. Ehlinger.)

A. These documents all represent canned fish products.

On this first document, No. 41, 150 cases of red salmon.

On document No. 41-A, 100 cases of red salmon, and 50 cases of medium red salmon. Two varieties.

41-B represents 300 cases of tuna.

41-C represents 200 cases of red salmon, and 100 cases of crabmeat. Invoice No. 106 represents 80 cases of salmon.

Q. And those are the amounts and quantities shipped through your brokerage?

A. That is correct.

Q. Now, as a result of these shipments, when was the first time that you had discovered that all was not as had been represented?

Mr. Whitney: Wait a minute, if the Court please. I object to that.

The Court: Yes, I don't know what you mean.

Mr. Eubank: I will withdraw the question. [292]

Q. (By Mr. Eubank): In relation to these orders, did you pay a visit to Phoenix, Arizona?

A. Shortly after the last shipment was transmitted——

Q. Answer yes or no.                      A. Yes.

Q. And why did you visit Phoenix?

A. I came to Phoenix because——

Mr. Whitney: If the Court pleases, I object to it as immaterial.

The Court: We will see whether it is or not. Go ahead.

(Testimony of Jack J. Ehlinger.)

The Witness: I came to Phoenix because when none of the drafts had been lifted from the bank, myself and Mr. Gavin began to investigate the situation, and called several people whom we knew quite well, and who immediately told us that we had better——

Mr. La Prade: We object to it as hearsay.

The Court: Yes, don't tell anything that was told you.

Q. (By Mr. Eubank): Now, what was the date of this trip to Phoenix?

A. I arrived in Phoenix on July 10th.

Q. And what was the first thing you did in relation to Ben Hoffman?

A. The first thing I did was to endeavor to meet one of my buyers, but I was unable to locate Mr. Hoffman.

Q. Did you in that process go to a shipping line here in [293] Phoenix?

A. That was my second call. I went to the shipping line to find out.

Q. What was the name of the shipping line?

A. American Consolidators.

Q. How did you know of the American Consolidators?

A. Because the merchandise was consigned to them in Los Angeles for trucking into Phoenix. They are a well-known freight forwarding line.

Q. And did you, while you were down here, go to the offices of Acme Distributing Company?

A. Yes, I did.

(Testimony of Jack J. Ehlinger.)

Q. And was that in Tempe or Mesa?

A. That was in Tempe.

Q. Do you recall approximately the location?

A. Yes, it was on Apache Boulevard.

Q. Now, did you go up to the office?

A. Yes.

Q. Was anyone present?

A. There was a young lady present in the office.

Q. And as to the conversation there——

Mr. Whitney: Wait a minute. Who was the conversation with at the time, and who was present?

The Witness: In the office?

Mr. Whitney: Yes. [294]

The Witness: When I came into the office, this young lady was present, and I asked whether Mr. Hoffman were in or whether he would be back.

Q. (By Mr. Eubank): And what was her reply to that?

A. She said he was not in, and she did not know when he would return.

Q. And is that the only time that you were in this particular office, or did you make other trips there?      A. I made one other trip.

Mr. Whitney: Pardon me?

The Witness: I made one further trip there, and the office at that time was closed.

Q. (By Mr. Eubank): When you were in the office, would you explain to the jury the type of office it was, I mean, the furniture in it.

A. It is rather difficult, because it was very bare.

(Testimony of Jack J. Ehlinger.)

There was a desk in there. I don't recall that there was even a phone.

Q. Was there a typewriter?

A. I don't recall specifically.

Q. Was there any filing cabinets?

A. Not to my recollection.

Q. Your testimony would be that it was, except for the few pieces of furniture, it was a fairly bare office, is that [295] correct? A. Correct.

Q. Now, Mr. Ehlinger, were you successful in locating any of the products that you had shipped?

A. I was successful in locating the major portion of it.

Q. And where, or at what places did you locate those products?

A. Must I answer the specific destination of them, you mean?

Q. Well, where did you find your products?

A. Well, I found the products at two super markets, primarily.

Q. What were the names of the markets?

Mr. Whitney: I object to that as immaterial.

The Court: I don't know. We will have to find out about this.

The Witness: One was I believe known as Safeway Stores, Russ Keeton, and the other was Nebs Market, who I subsequently learned was likewise a Mr. Keeton.

Q. (By Mr. Eubank): In those stores, do you recall the types of your merchandise that was on display?

(Testimony of Jack J. Ehlinger.)

A. Yes, I do. There was Red Salmon on display, and advertised at a specific price. [296]

Q. Now, what was the retail selling price of the salmon that was displayed?

A. In Phoenix, it varied. 59c. 59, as I recall.

Q. Let us go to Russ Keeton, Safeway Market, what was it on sale for? A. 59c.

Q. Now, let us go to the Nebs Market.

A. Both of those markets advertised.

Q. At what price? A. At 59c.

Q. At 59c? A. Yes.

The Court: 59c for what?

The Witness: Per one pound can.

Q. (By Mr. Eubank): Now, could you look at Government's Exhibits 41, 41-A through 41-D, and tell the types of salmon that you saw on display?

A. Yes, I could do that. I could tell you the type that was being displayed.

Q. When you say the type of salmon, you mean the brand?

A. The type of salmon, Red Salmon.

Q. In the brand name of Gavin?

A. Gavin Brothers, yes.

Q. Would you do that, please? [297]

A. Well, on our No. 1 here, it is all Red Salmon.

Q. Was that on display?

A. This Red Salmon was on display.

Q. At which markets?

A. At Russ Keeton's Market.

Q. Okay. Now, let us go to the next one, that is 41-A.

(Testimony of Jack J. Ehlinger.)

A. 41-A. I did not see this brand on display.

Q. What brand is that?

A. That is Medium Red Salmon.

Mr. Whitney: And what is the other one?

The Witness: The other is Red. I did see that on display.

Q. (By Mr. Eubank): Where did you see it on display? A. Likewise at Russ Keeton's.

Q. All right, 41-B.

A. I saw this merchandise on display at Nebs Market. This represents tuna.

Q. Which one in particular. Would you read both of those?

A. Both. One is what is known as a Light Meat. The other is White, or Albacore.

Q. That is in relation to Exhibit 41-B?

A. 41-B.

Q. And that was on display at Nebs Market?

A. At Nebs Market, yes. [298]

Q. Now, in regard to 41-C?

A. In regard to 41-C, this is the same Red Salmon again. There were several shipments of the same salmon.

Q. That was on display at what market?

A. Russ Keeton's Market.

Q. Now, 41-D?

A. 41-D, I did not see on display. That was the shipment we sent down. However, I have the destination.

Q. Now, at both Russ Keeton's Super, or Safe-way Stores, and Nebs Market, those items were,



(Testimony of Jack J. Ehlinger.)

although Tuna was in Nebs, and Salmon in Russ Keeton's, they were both at what price? Fifty something?

A. I don't recall without checking the ad at what price the Tuna was being sold. I do recall specifically, because we have the ads on the Salmon, that the merchandise was being sold to the consumer at 59c.

Q. Now, on the Tuna fish, do you have a copy of the ad with you?      A. No, I don't.

Q. Did you make a memorandum or note of that?

A. Pardon me?

Q. Did you make a memo or a note?

A. I made a memo of it, yes.

Q. Did you make a memo when——

A. When I was in the market. [299]

Q. When you were in the market?

A. Yes.

Q. May I have that?

A. Oh, you mean do I have the memo with me?

Q. Yes.

A. No, it is attached to our ads. I didn't bring the complete file on that. I don't have that.

Q. Do you recall at what price the tuna was advertised for?

A. As I recall, and I will not state this as a matter of fact——

Mr. La Prade: I object to it, then, your Honor.

The Court: Yes, if you don't know.

Q. (By Mr. Eubank): Do you recall if there

(Testimony of Jack J. Ehlinger.)

was an ad run in the paper by Nebs Market in regard to this Tuna?

Mr. Whitney: I object to this as immaterial.

The Court: He may answer.

The Witness: No, I do not recall that.

Q. (By Mr. Eubank): You do not recall. Now, in regard to the types of salmon that was shipped into this area, are you familiar with the northern or northwest price market for this type of fish?

A. Yes, I am. [300]

Q. Again referring to Government's Exhibit 41, would you tell us what the wholesale price in the northwest is for these types of salmon in 1954.

A. In 1954, the cost to the wholesale grocer, or national chain on this variety of salmon was \$27.50 a case.

Q. What variety of salmon?

A. That, of course, is exclusive of freight. That is at the shipping point.

Q. Is it possible to tell the relation of that number to the poundage?

A. Yes, the salmon is packed 48 one-pound cans to the case.

Q. So what you do is divide the 48 by this number?

A. By this number, plus freight.

Q. Plus freight.

A. So there would be approximately, in this market, approximately \$2.00 a case additional.

Q. Now, that is in regard to Bristol Bay Red Salmon. Does each of the fish, or the fish listed on

(Testimony of Jack J. Ehlinger.)

these sales memos, can the price per pound be determined in that manner?

A. It can very easily be determined, yes.

Q. Now, as far as the northwest market is concerned, did these prices represent the figure at that time, as far as you know?

A. They did, yes. [301]

Q. And did you make other sales of salmon and fish products at this time?

A. Yes, we did, at those prices.

Q. Are these prices the same or similar to those?

A. Similar to those prices, yes.

Q. Now, when you arrived in Phoenix and began looking for the different merchandise, would you relate to the jury where you found—other than Keeton's, both Keeton's markets, where you found other merchandise that had been shipped?

Mr. Whitney: I object as immaterial.

The Court: You may answer.

The Witness: May I answer that?

Mr. Eubank: Yes.

The Witness: I have a record—I, in an endeavor to cooperate with our shipper, covered considerable country from Tucson all through the Valley, and many, many markets. I only located in two markets, and a very negligible quantity of salmon. One was Wright's Market.

Q. (By Mr. Eubank): Do you have the address?

(Testimony of Jack J. Ehlinger.)

A. I think I have got the address. It is Justrite Store, on North 7th Street.

Q. What type of fish did he have in there?

A. He had Red Salmon. [302]

Q. And was that Gavin?

A. That was Gavin. But he only had ten cases.

Q. And that is the only other store that you located?

A. And I don't have the address here, at Roland's Market.

Q. Where was that located, what city?

A. That was located in Phoenix. I don't have their address.

Q. What type of fish did they have?

A. Likewise Red Salmon. And the price that the buyer paid for it. Do you want that price?

Q. The price it was advertised for sale?

A. The price at which the buyer bought it?

Q. No. Now, you have testified as to the trip down here and the initial telephone calls. And you have testified as to the statements made by Mr. Hoffman, the failure to lift the draft.

When you arrived down here, did you visit the bank that that draft was on?

A. No, I did not. That was handled from the northwest.

Q. And you have testified that at no time did you talk to Mr. Hoffman personally when you were down there?

A. That is correct.

Q. When you were at Tucson, did you attempt to drop in at the Hoffman's Wholesale Grocery

(Testimony of Jack J. Ehlinger.)

down there?           A. No, I did not. [303]

Q. You were merely looking for other merchandise?           A. Correct.

Mr. Eubank: No further questions.

Cross-Examination

By Mr. Whitney:

Q. Mr. Ehlinger, these canned goods were sold on credit?

A. I would say you could interpret it as such.

Q. Sir?           A. I would say yes.

Q. And Mr. Hoffman didn't pay?

A. Correct.

Q. Nor the Acme Distributing Company didn't pay you?           A. Correct.

Q. You filed a suit in this court on the 13th of April, 1955, to collect what was due you; is that correct?           A. I don't recall it.

Q. You recall that a suit was filed?

A. I was in Phoenix.

Q. Pardon?

A. I was in Phoenix as a witness before the Grand Jury.

Q. You authorized one to be filed? I am talking about a civil suit.

A. You are talking about a civil suit?

Q. That is right.

A. To the best of my knowledge, no civil suit has been filed. [304]

Q. Did you authorize a suit filed in this court

(Testimony of Jack J. Ehlinger.)

numbered Civil-2208, Phoenix, entitled Gavin Brothers, Inc., a Washington Corporation, and Grant-Whitman Company, a Washington Corporation, against Mr. Hoffman and two other people?

A. There is a suit in preparation.

Q. Yes?

A. Of course, I don't know the legal technicality, as to whether it is filed or not.

Q. Your corporation filed that, you authorized that?

A. We authorized preparation of a suit; yes.

Q. And in that suit you are suing Mr. Hoffman for \$1,511.89?

A. Correct. Our company; yes.

Q. That suit, according to the date, however, was filed April 13, 1955. That suit was filed for the purpose of collecting that money that was due you?

A. That was the objective; yes.

Q. And Gavin? A. Correct.

Q. Who had sold Mr. Hoffman on credit?

A. Yes.

The Court: What was the 1500, your commission?

The Witness: No; that was merchandise we shipped ourselves.

Q. (By Mr. Whitney): As I understand, on your direct examination you stated [305] that you had never met Mr. Hoffman.

A. That is correct.

Q. Did you ever talk to Mr. Hoffman?

A. By phone; yes.

(Testimony of Jack J. Ehlinger.)

Q. I mean, personally, you never talked to him?

A. Personally; no.

Q. You talked to a man that said he was Mr. Hoffman?

A. By phone, right. Right.

Q. Now, what connection, if any, have you with Gavin Brothers?

A. We are the agent for Gavin Brothers.

Q. You are the agents for Gavin Brothers?

A. Correct.

Q. In other words, if I were to call you up and ask you to send me ten cases of salmon, you would transfer that order right to Gavin Brothers?

A. Correct.

Q. When was this sale made by you amounting to \$1,511.89? When was that made, do you remember?

A. Yes; I can tell you exactly. That was made on June 24th.

Q. Pardon?

A. June 24th.

Q. What date?

A. June 24th. [306]

Q. That was not the result of this first phone call you testified to?

A. No; it was not.

Q. But a subsequent one?

A. Subsequent.

Q. Why wasn't that order sent to your principal, Gavin Brothers?

A. Because this salmon was in Spokane, Washington, and it is not unusual in marketing practice to locate merchandise and to transmit it to any given buyer.

Q. You kept trying to sell Mr. Hoffman as late as July, further goods?

(Testimony of Jack J. Ehlinger.)

A. I don't believe you are correct.

Q. Pardon me?

A. I don't believe you are correct in that statement. The last date—no; you were right, July 8th was the last invoice from Gavin?

Q. And that was on credit, also?

A. That was on terms that were agreed upon between the parties.

Mr. Whitney: That is all, Mr. Ehlinger. Thank you.

### Redirect Examination

By Mr. Eubank:

Q. Mr. Ehlinger, are you familiar with the full name of the suit that Mr. Whitney referred [307] to?

May I see that?

Mr. Whitney: You can look at the file.

Q. (By Mr. Eubank): Are you familiar with the full name of the suit that Mr. Whitney was referring to?

A. Our attorneys have the documents.

The Court: Did you ever see any of these? You don't know anything about this lawsuit, do you?

A. On these documents?

The Court: Yes.

The Witness: Very little.

The Court: Well, why waste time on that.

Mr. Eubank: Could I refresh his recollection?

The Court: There is nothing to refresh. The



lawyers drew the papers. These clients don't know anything about what their lawyers do.

Mr. Eubank: No further questions, Mr. Ehlinger.

The Court: Is that all?

Mr. Whitney: That is all.

(Witness excused.)

The Court: It is almost twelve. We will suspend until two o'clock. Keep in mind the Court's admonition.

(The noon recess was taken.) [308]

The Court: Call your next witness.

Mr. Eubank: Douglas Wassom.

### DOUGLAS WASSOM

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Douglas Wassom, W-a-s-s-o-m?

A. Right.

Q. And you are with the First National Bank?

A. Yes, sir.

Q. At the branch office in Tempe, Arizona?

A. Right.

Q. What is your capacity with the bank?

A. Assistant Cashier.

Q. You are here under a subpoena duces tecum?

A. Right?

(Testimony of Douglas Wassom.)

Q. And we asked you to bring certain bank records with you. [309] Do you have them?

A. Yes; I do.

Mr. Eubank: I ask that this exhibit be marked as Government's Exhibit 42 for identification.

(Said Receipt for Drafts was marked as Government's Exhibit 42 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 42 for identification, and ask you if you recognize the document? A. Yes; I do.

Q. Will you tell the jury what this document is?

A. This is a record of Incoming Drafts which we received on two different dates, July 14, 1954, and July 15, 1954, from the Security First National Bank of Los Angeles.

Q. And this particular form, is that your company form? A. Right.

Q. And is this the only record that you keep of this type of transaction in your records?

A. This is the only one we keep of these.

Q. And from this particular type of record, what information is kept on it?

A. The information is kept as to who we received the draft from, who it was drawn to, and the amount of it, the date we received it, the collection number of the bank from which it was received, and the instructions as to what disposition was to [310] be made of it by us.

Q. Will that statement show whether monies were paid or not? A. Yes; it will.

(Testimony of Douglas Wassom.)

Mr. Eubank: I offer Government's Exhibit 42 in evidence.

Mr. Whitney: I have a question on voir dire.

Q. (By Mr. Whitney): When was this made up, sir?

A. At the time that it was received, July, 14th, 1954.

Mr. Whitney: No particular objection to it, your Honor. It is cumulative.

The Court: All right, it may be received.

The Clerk: Government's Exhibit 42 in evidence.

(Said Receipt for Draft's was received in evidence and marked as Government's Exhibit 42.)

Q. (By Mr. Eubank): Now with reference to Government's Exhibit 42 in evidence, will you relate to the jury the first draft on that page, and who was the draft drawn to, or drawn on?

A. Drawn on the Acme Distributing Company, 818 Apache Boulevard.

Q. And what was the amount of the draft?

A. The amount of one draft was \$8,289.99.

Q. And the date of that particular draft?

A. The date that we received it was July 15, 1954. [311]

Q. And was that draft paid or not paid?

A. According to the record, it says that no attention paid to notice. Was returned on September 9th, 1954.

(Testimony of Douglas Wassom.)

Q. Now, in regard to the second draft on this page.       A. It was dated July 14, 1954.

Q. And who was the payor?

A. Acme Distributing Company, 818 Apache Boulevard, Tempe, Arizona.

Q. And what was the date of this particular draft?       A. We received it July 14, 1954.

Q. And the amount?       A. \$6,824.58.

Q. And can you tell if this one was paid or not paid?

A. It says that No Attention Paid to Notice, returned July 9, 1954.

Q. Now, the third and last draft on the page, who is the payor?

A. Acme Distributing Company, 818 Apache Boulevard, Tempe, Arizona.

Q. And the date received?

A. July 14, 1954.

Q. And the amount?       A. \$4,123.45.

Q. And the disposition?

A. No attention Paid to Notice, Returned September 9, 1954. [312]

Mr. Eubank: No further questions.

### Cross-Examination

By Mr. Whitney:

Q. Mr. Wassom, your handwriting on there, was that put on the date that it is purported to have been there?       A. Correct.

Q. And this first draft that you received was

(Testimony of Douglas Wassom.)

July 15th, 1954?           A. Right.

Q. That is right. The second draft mentioned here is July 14, 1954?           A. Right.

Q. Both from the head office of the Security First National Bank in Los Angeles?

A. Right.

Q. And the drafts were on the Acme Distributing Company?           A. Right.

Q. And were not paid?           A. That is right.

Q. And then the third one on here is also on June 14, 1954?           A. Right.

Q. That was also not paid?           A. Right.

Q. Is that correct?           A. Yes. [313]

Q. How long have you been in the banking business?

A. I have been with the bank about eight months.

Q. Eight months?           A. Right.

Q. You weren't there, were you, when this was made up?           A. No, sir.

Q. Of course, you haven't been there long enough, maybe, to testify to this, but I might ask you, have you ever had any draft, or, if you know of any draft from other people, to other people that have come into your bank that have not been paid?

A. Yes, sir.

Mr. Whitney: That will be all.

Mr. Eubank: No further questions.

The Court: That will be all.

(Witness excused.)

## OLIVER R. WELLS

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

## Direct Examination

By Mr. Eubank:

Q. Your name is R. W. Wells?

A. Oliver R. Wells.

Q. Oliver R. Wells. Pardon me. You were sworn earlier in this court? [314]

A. That is right.

Q. You are the manager of American Consolidators?

A. Yes.

Q. Here in Phoenix, Arizona?

A. Yes.

Q. At 1133 W. Hilton Avenue?

A. That is right.

Q. Mr. Wells, do you know the name of Ben Hoffman?

A. Yes; I do.

Q. Do you know the name of Acme Distributing Company?

A. Yes, I do.

Q. Have you ever seen Mr. Hoffman before?

A. Yes, I have.

Q. Do you see him in this room?

A. Yes.

Q. Will you point him out to the jury?

A. That is Mr. Hoffman back there (indicating).

Q. At the second table there?

A. Yes.

Q. You are here as a result of a subpoena duces tecum, are you not, and asked to bring certain records of your company?

A. Yes.

Q. And did you bring those records with you?

A. Yes, I did.

(Testimony of Oliver R. Wells.)

Mr. Eubank: May these be marked for identification, please. [315]

The Clerk: Government's Exhibits 43, and 43-A through C, for identification.

(Said Freight Bills were marked as Government's Exhibits 43, and 43-A, B, and C for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibits for identification 43, 43-A, B, and C, and ask you if you recognize these documents?

A. Yes, I do.

Q. How do you recognize them?

A. They are American Consolidators freight bills.

Q. Are those the ones you brought with you?

A. That is right.

Q. These freight bills, will you describe how they are kept in the records of your company?

A. Well, they are kept by a freight bill number that is up here at the top right-hand corner, and also by a reference number that is right below the term reference on the freight bill, and they are kept in the files of our company in Los Angeles.

Q. And how long are they kept?

A. They are kept for seven years.

Q. Is there any particular reason for that?

A. The Interstate Commerce Commission regulations.

Q. You have identified 43. Now, will you look at 43-A? [316]

A. Yes.

(Testimony of Oliver R. Wells.)

Q. And see if your same statement goes to that?

A. The same statement goes to this one.

Q. And 43-B?

A. And to 43-B, that is right.

Q. And to 43-C?           A. That is correct.

Q. And all four of those documents are the documents of your company?           A. That is right.

Q. Now, you say that these are filed in Los Angeles. Can you tell me how you came by them?

A. Yes, I called my Los Angeles office when I received the subpoena, and referred to those particular documents, and I called my Los Angeles office and asked them to dig them up and send them to me.

Q. And when did you receive the documents?

A. I received those Wednesday morning.

Q. And they are these same documents?

A. They are the same documents.

Mr. Eubank: I ask that Government's Exhibits 43 and 43-A, B, and C, for identification, be admitted in evidence.

Mr. La Prade: If the Court please, we object to the introduction of these documents on the ground that this witness is not the custodian of them. He has no personal knowledge of the [317] entries made on them, and they should be properly authenticated by a person who has custody in the Los Angeles office.

The Court: Did you ever have those documents in your possession?

The Witness: Did I ever have, sir?



(Testimony of Oliver R. Wells.)

The Court: Yes.

The Witness: Yes, I did.

The Court: You sent them back to Los Angeles?

The Witness: I sent them back to Los Angeles.

The Court: All right, they may be received.

The Clerk: Government's Exhibits 43, and 43-A to C, inclusive, in evidence.

(Said Freight Bills were received in evidence and marked as Government's Exhibits 43, 43-A, B, and C.)

Q. (By Mr. Eubank): Now, referring to Government's Exhibits 43 and 43-A in evidence, will you please, in regard to 43, tell us the company that the shipment was handled from?

A. The shipment was handled from our—our shipper was the Can-Go Shippers, Inc., of Seattle, Washington.

Q. Do you know who Can-Go Shippers are?

A. Yes, I do.

Q. Will you tell the jury who Can-Go Shippers are?

A. Can-Go Shippers is an association of canned goods packers in the northwest area who have consolidated together [318] in order to get the volume rate on larger shipments.

Q. So the actual name of Can-Go doesn't actually represent the name of the person that might own the products shipped?

(Testimony of Oliver R. Wells.)

A. No, Can-Go is the name of the association of all the shippers.

Q. From this title here, is it possible to refer back to a statement to find out who the name of the original shipper is? A. It would be, yes.

Q. From these numbers?

A. Yes. With further documents.

Q. Now, in regard to this particular shipment, who was the shipment made to, and the date?

A. The shipment was made to the Acme Distributing Company.

Q. And the date of that?

A. And the date the shipment was made is June 22nd, in Los Angeles. We received it in Los Angeles June 22nd, and the shipment was received here on June 23rd.

Q. Now, in regard to Government's Exhibit in evidence 43-A, would you please tell who the shipper of that was?

A. Can-Go Shippers Association.

Q. And to whom?

A. To Acme Distributing Company.

Q. Now, on this particular item, what was the shipping date?

A. The shipping date in Los Angeles, we received it [319] June 25th, 1954.

Q. And your delivery date?

A. And our delivery date in Phoenix was June 26th, 1954.

Q. Now, in regard to Exhibit 43-B, who was the shipper of that?

(Testimony of Oliver R. Wells.)

A. Can-Go Shippers Association.

Q. To whom?

A. Acme Distributing Company, June 29th, 1954, received here June 30th, 1954.

Q. Now the last one?

A. Can-Go Shippers Association.

Q. Exhibit 43-C, isn't it?

A. Yes. Acme Distributing Company.

Q. Is the consignee?

A. Is the consignee. July 2nd is the shipping date, and it was received July 3, 1954.

Q. Now, on any of these documents that you hold in your possession, did Mr. Hoffman appear personally at the dock and take a delivery?

A. Yes, he did.

Q. And at that time, did you require him to sign and initial in your presence?

A. Well, it was not in my presence. The manager of the company, I was the manager of the company.

Q. And he did not sign in your presence. [320]

A. No.

Mr. Whitney: I object to that as hearsay.

Mr. Eubank: I am just asking if he signed in his presence. Did he sign in your presence?

The Witness: He did not sign in my presence.

Q. (By Mr. Eubank): There is only one other item I would like to get from you, Mr. Wells, that in referring again to 43, I don't believe we have the type of shipment, or the description of these. Would you, as I call the number, describe the goods that

(Testimony of Oliver R. Wells.)

were delivered?           A. Yes.

Q. Exhibit 43?

A. Exhibit 43 was a shipment of canned fish.

Q. How many cans?           A. 150 cases.

Q. And 43-A?

A. Was a shipment of 200 cases of canned fish.

Q. And 43-B?

A. Was a shipment of 300 cases of canned fish.

Q. And 43-C?

A. Was a shipment of 200 cases of canned fish and 100 cases of crab.

Q. Did you talk, at any time, to Mr. Hoffman about these [321] particular shipments?

A. Yes, I did.

Q. What did Mr. Hoffman say to you?

A. Mr. Hoffman came into my office at the time we received the first of this series of shipments and asked that since the freight bill read Tempe, that it be diverted to him in Phoenix, and he also asked that we deliver to more than one place. And I had to tell Mr. Hoffman that we couldn't legally do that. And then Mr. Hoffman asked if we would make one delivery in Phoenix, and I told him we could do that, after which he told me where to take the shipment, and I gave the instructions to my men.

Q. Do you recall which particular shipment that was?           A. Yes.

Q. Could you identify it from these records?

A. Yes, I could. I have it. It is number 43.

Q. Exhibit 43 is the shipment that he directed

(Testimony of Oliver R. Wells.)

you to deliver to a certain spot?           A. Yes.

Q. Do you recall the spot you were to deliver the shipment to?           A. Yes, I do.

Q. What was the spot?

A. It was Keeton's Market on West Van Buren.

Q. Who was it delivered to, or do you [322] know?           A. My drivers reported——

Q. That is all right. You don't know. In regard to these particular shipments, do you recall at all the brand names of the goods that were shipped?

A. No; I do not.

Q. If you looked at these bills or these documents, could you then tell?

A. No, sir. On our freight bills the name didn't appear. All those were canned fish.

Mr. Eubank: I have no further questions.

### Cross-Examination

By Mr. Whitney:

Q. Mr. Witness, if a shipment was coming over your lines to me here in Phoenix, and I would authorize you to send that shipment to Mesa, you would do it, wouldn't you?

A. Yes, sir. At a further charge.

Q. That is in the ordinary course of your business?           A. In the ordinary course, yes, sir.

Mr. Whitney: That is right. That is all.

Mr. Eubank: No further questions.

The Court: That will be all.

(Witness excused.)

## HAROLD LEIDY

called as a witness in behalf of the Government, having been first duly sworn, testified as [323] follows:

## Direct Examination

By Mr. Eubank:

Q. Your name is Harold Leidy?

A. That is right.

Q. And you are presently employed with Busy Bee Transportation & Warehouse?

A. That is right.

Q. And what is your capacity there?

A. Foreman.

Q. And that location is at 601 West Jackson, Phoenix, Arizona?      A. That is right.

Q. Mr. Leidy, you were formerly employed by Mr. Oliver R. Wells, American Consolidators, is that not correct?      A. That is right.

Q. And you were so employed in June and July of 1954?      A. That is right.

Q. Now, Mr. Leidy, do you recognize the name of Ben B. Hoffman?      A. Yes; I do.

Q. And the name of Acme Distributing Company of Tempe?      A. Yes.

Q. Do you see Mr. Hoffman in the room?

A. Yes, sir.

Q. Would you point him out to the jury, [324] please?

A. He is the gentleman sitting right behind you there with the brown suit on.

Q. Now, in regard to Mr. Hoffman, and to your

(Testimony of Harold Leidy.)

employment at the American Consolidators, do you recall at any time doing business with Mr. Hoffman on the docks at American?      A. Yes, sir.

Q. Now, I show you Government's Exhibits 43, 43-A, B, and C, in evidence, and ask you to examine the documents.      A. Yes, sir.

Q. Now, these particular transactions, in these particular transactions, do you recall Mr. Hoffman?

A. Yes, sir.

Q. Now, how do you recognize these particular transactions?

A. Because I was the one that received the money from Mr. Hoffman and signed them paid on three of the shipments.

Q. When you say received the money, what do you mean?      A. The freight charges.

Q. The freight charges?      A. Yes.

Q. And are those your initials?

A. This is my initial and last name.

Q. And this is the date of delivery?

A. Yes.

Q. That is so on Government's Exhibit 43, Government's Exhibit 43-B, and on Government's Exhibit 43-C? [325]

A. Yes. And this was received at the office.

Q. And 43-A was not received by you?

A. No. Will you explain to us how this money was paid to you?      A. It was paid in cash.

Q. Who paid it?      A. Mr. Hoffman.

Q. And where did he pay it?

(Testimony of Harold Leidy.)

A. He paid it at the dock, the American Consolidators.

Q. Now, in regard to those particular shipments, did Mr. Hoffman say anything to you about them, in relation to them?

A. No, just to give us the information as to where they were to be delivered, the shipments.

Q. What information did he give you as to the delivery of the shipments?

A. Well, the first shipment was to be delivered to Russ Keeton's Market. The second one was delivered to 44th and Thomas, Nebs Market. The third one I believe he picked up, and the fourth was delivered to 44th and Thomas.

Q. Now, can you tell by looking at those documents which ones he asked to be delivered, and where?

A. Roughly, yes.

Q. All right (handing document to witness.)

A. This one, I believe this is the one that was delivered [326] to Russ Keeton's.

Q. That is Exhibit 43?

A. Yes. And then this one out to 44th and Thomas.

Q. That is Exhibit 43-A. And what market is that?

A. That was Nebs Market at 42nd and Thomas. This here one he picked up.

Q. That is 43-C?

A. Yes. And this one here was also delivered to 44th and Thomas, Nebs Market.



(Testimony of Harold Leidy.)

Q. Now, did you make any of these deliveries yourself?      A. No, sir.

Q. They were made by somebody in the company?      A. By drivers employed by us.

Q. Was that the only thing that you recall in talking to Mr. Keeton about these transactions?

A. I wasn't in touch with Mr. Keeton at all. All the transaction was with Mr. Hoffman.

Q. Mr. Hoffman?

A. It was all through Mr. Hoffman, yes.

Q. Did Mr. Hoffman sign on those three bills, did he sign those in your presence?

A. No, sir; they were signed at the delivery destination.

Q. And in your particular office, or when you worked for American, those bills went along with the shipment, did they not? [327]      A. Yes.

Q. And who then procured the signature?

A. The drivers that made the deliveries.

Q. And was that usually at the—was that at the point of delivery?

A. At the point of delivery.

Q. And at the point of unloading?

A. Yes.

Mr. Eubank: No further questions.

Mr. Whitney: No questions.

The Court: That will be all.

(Witness excused.)

## H. N. KEETON

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

## Direct Examination

By Mr. Eubank:

Q. Your name is H. N. Keeton?

A. That is right, sir.

Q. And that is K-e-e-t-o-n? A. Yes.

Q. Mr. Keeton, you are the proprietor of Nebs  
Market? A. My son and I are.

Q. That is at 4336 East Thomas Road?

A. That is right, sir. [328]

Q. At Phoenix, Arizona? A. Right, sir.

Q. Now, Mr. Keeton, do you know Mr. Ben  
Hoffman? A. I do.

Q. Do you know the name of Acme Distributing  
Company? A. Yes, sir.

Q. Do you see Mr. Hoffman in this room?

A. I do, sir.

Q. Will you point him out to the jury there?

A. That is Mr. Hoffman on the back row back  
there.

Q. Now, you are here under a subpoena duces  
tecum, is that not correct? A. That is right, sir.

Q. And we asked you to bring certain records of  
purchases made by you from Mr. Hoffman?

A. I was asked to do that, Mr. Eubank, but I be-  
lieve the records, my cancelled checks and my paid  
invoices are in your folder, or in a folder. I don't  
have them in my possession, sir.

Q. That is right, Mr. Keeton. And in reply to  
the subpoena, you are here this morning?

(Testimony of H. N. Keeton.)

A. Yes.

Mr. Eubank: I ask that these be marked for identification.

The Clerk: Government's Exhibits 44, 45, 46, and 47 for identification.

(Said checks and receipts were marked as Government's Exhibits 44, 45, 46, and 47 for identification.) [329]

Q. (By Mr. Eubank): Mr. Keeton, approximately, do you recall when these purchases of seafood were made by you from Mr. Hoffman?

A. Yes. If I remember correctly, Mr. Eubank, they were made the latter part of June and the first part of July, 1954.

Q. Now, in relation to these purchases, would you please tell the jury the circumstances that Mr. Hoffman approached you to sell seafood products?

A. Well, if my memory serves me correctly, some two or three days before Mr. Hoffman came to see me in person, he called me on the telephone and told me who he was, Mr. Ben Hoffman, with Acme Distributing Company, and told me that, I believe at that time that he had salmon, and I believe tuna, which we bought, tuna and salmon, and I am not sure at the time whether there was a price discussed over the telephone, but when Mr. Hoffman came to see me, why, he told me what he had, and we discussed the price of both, and we later bought it.

I am sure that at that time that he was there. If

(Testimony of H. N. Keeton.)

I remember correctly, we didn't buy it at that time. It seems that he called me later, and after having discussed this with my son, we gave him the order for the salmon, which I believe was first, and later the tuna.

Q. Now, Mr. Keeton, I show you Government's Exhibit 44 for identification, and ask you if you recognize those documents? [330]

A. I do, sir.

Q. First, the check. A. Yes, sir.

Q. And how do you recognize it? Is this your signature? A. That is my signature, sir.

Q. Is that one of your checks?

A. It is, sir.

Q. I ask you to examine the document attached to it and see if you recognize that document?

A. I do, sir.

Q. How do you recognize that document?

A. That was a receipt that Mr. Hoffman gave me at the time of this particular transaction.

Q. And I now show you Government's Exhibit 45 for identification, and ask you if you recognize the top document.

A. I do, sir. This check is ours, a market check drawn on the Bank of Douglas and signed by my son, H. N. Keeton, Jr.

Q. And do you know your son's signature?

A. I do, sir.

Q. And is that it?

A. That is his signature.

(Testimony of H. N. Keeton.)

Q. Examine the next document, and would you tell us what that document is?

A. That is a paid invoice or receipt that Mr. Hoffman gave us for this transaction, which this was tuna. [331]

Q. Now, I show you Government's Exhibits 46 and 47, and ask you to identify those documents.

A. I can identify this first one for \$1,250.00, which again was drawn on Nebs Market, written on the Bank of Douglas, and this is my signature.

Q. That is in regard to 46?

A. That is right. And this one dated July 9th, I recognize as being on our business, Nebs Market, drawn on the Bank of Douglas, made out to Mr. Hoffman, and my son signed it, and I recognize it as being his signature.

Mr. Eubank: Thank you. I would like that these instruments be admitted in evidence.

Mr. Whitney: Objection. They are immaterial to the issues.

The Court: They may be received.

The Clerk: Government's Exhibits 44, 45, 46, and 47 in evidence.

(Said documents were received in evidence and marked as Government's Exhibits 44, 45, 46, and 47.)

Q. (By Mr. Eubank): Now, relating back, Mr. Keeton, to Government's Exhibit 45 in evidence. First, Government's Exhibit 44 in evidence. Would

(Testimony of H. N. Keeton.)

you please state, if you can, what that check is in payment of, if anything?

A. Well, I would have to state that this particular check, [332] Mr. Eubank, would be in payment of Tall Salmon that we bought from Mr. Hoffman.

Q. Now, does the amount that shows on your receipt there, showing a check for \$2,000.00, bear any relation to this particular check?

A. It does, sir. It was in payment, or partial payment of this particular invoice.

Q. Now, as far as the receipt is concerned, would you read to the jury the items purchased, and the amounts paid for them? A. Read just this, sir?

Q. Yes.

A. 70 cases of Tall Salmon, \$2,030.00.

40 cases of Salmon, \$76.00. Which made a total of \$2,790.00. In payment, that is receipt of this check for \$2,000.00. That left a balance of \$790.00.

Q. Now, in regard to Government's Exhibit 45, can you tell what that check was in payment of?

A. Yes. After seeing this invoice, I would say that this check is in partial payment of the 200 cases of Tuna that we bought from Mr. Hoffman.

Q. Now, would you read the receipt there of the purchase?

A. I will, sir. 200 cases of Tuna, \$3100.000. And credit \$1,500.00.

Q. And the balance? [333]

A. And the balance is \$1500.00.

Q. Now, in regard to Government's Exhibits

(Testimony of H. N. Keeton.)

46 and 47 in evidence, do you have any recollection at the moment of what those two checks were in payment of to Hoffman, if anything?

A. Well, they would be in payment, Mr. Eubank, of either the Tuna or the Salmon, the only items that we bought from Mr. Hoffman.

Q. These are the only items you bought from Mr. Hoffman, is that correct?

A. That is correct.

Q. Had you known Mr. Hoffman before this particular transaction, Mr. Keeton?

A. I had not, sir.

Q. Have you had any business dealings with him prior to this time?

A. Prior to this?

Q. That is right.

A. I had not, sir.

Q. And had you had any in a personal manner? Had you ever met Mr. Hoffman before?

A. I had never seen him or met him until this transaction.

Q. Now, for example, one of the items purchased there by you was the Tall Salmon?

A. That is right, sir. [334]

Q. Do you recall at the time of purchase whether this was a particularly good deal for the season, for the market in Phoenix?

A. Well, Mr. Eubank, I want you to believe that in buying in quantities of 100 cases of anything that we felt, after discussing it for some time, that it was a good deal for us. Certainly it was at the time, and is now what we would term an off brand salmon,

(Testimony of H. N. Keeton.)

realizing it couldn't command the price that a well-know brand of salmon could. I give as an example Del Monte or Libby.

Q. For that period, you felt it was a good price for that product, would that be your testimony?

A. I thought that it was a good price, and I felt, undoubtedly felt that it was a good buy for us. It was the reason for our buying in quantities like that.

Q. Now, in referring to the exhibit, Government's Exhibit 45 in evidence, a purchase of 200 cases of Tuna, was your reasoning similar for purchasing the Tuna? A. That was right.

Q. And it was the brand that was not familiar?

A. It was a brand that I would term, and certainly my customers did, that it was an off brand, and it was borne out by the fact that I still have some of that on hand after more than two years.

Q. Okay. Now, in regard to this particular tuna. Do you [335] recall the prices that you marketed and sold that for? A. The Tuna?

Q. Yes.

A. Well, I remember, I believe I am correct in stating this, that it was two different kinds of tuna. One would be a white Albacore Tuna, which would be a better grade than just a white tuna. And if memory serves me correctly, we attempted to sell that 3 cans for 98c, and when it didn't move as fast as we wanted it to move, it has taken up space and money we had tied up in it. it was later reduced



(Testimony of H. N. Keeton.)

lower than the 3 cans for 98c, but I am not positive what that price was.

Q. Now, the other type of tuna, other than the Albacore, do you recall what that sold for?

A. No, I don't. We had the biggest quantities of the tuna, that if I remember correctly, was the tuna that I spoke of a while ago, and we sold quite a bit of it for three cans for 98, but the balance of it I am just not sure.

Of course, in our business, we use a lot of, in other words, leaders or we will say lost leaders, and it was sold for less than that, but I am just not positive what we sold the brand for, sir.

Q. Is there any way by looking at this document to check the amount of money, so that you can testify as to what the actual price, or is this the actual price of this salmon to you? [336] In other words, the \$3,100.00, that is all you paid for the 200 cases, is that correct?

A. That is tuna, I believe, Mr. Eubank.

Q. Tuna?

A. That is right. In other words, everything that is there, Mr. Eubank, any transaction that I had is on those invoices, paid invoices, and my checks. There was no cash involved.

Mr. Eubank: No further questions.

(Testimony of H. N. Keeton.)

Cross-Examination

By Mr. Whitney:

Q. You lots of times, Mr. Keeton, buy in large quantities, if you can buy groceries in large quantities? A. Yes; I do, sir.

Q. In order to have any competition with the chain stores, you have to buy in large quantities?

A. That is essential now, sir.

Q. In order to get the price. And at times do you ever buy what you would call damaged goods, goods like have been in a train wreck?

A. I have for the last ten years, sir.

Q. You get those at a nice price?

A. At a greatly reduced price.

Mr. Eubank: I object to this line of testimony, on relevancy. [337]

The Court: If you want to call this man as a witness, you may do it.

Q. (By Mr. Whitney): I believe you stated this was an off brand of salmon, and that you still have some on hand? A. That is true, sir.

Q. In other words, it is harder to sell an off brand than it is a regular brand like Libby or Del Monte, and the like?

A. That is true, not only with salmon or tuna, but with any other food products.

Q. Now, some of that salmon that was sold to you as Red Salmon, was it Red Salmon?

(Testimony of H. N. Keeton.)

A. It was not.

Q. How do you know that?

A. Well, my customers were first to tell me, and instead of being Red Sockeye Salmon as we had thought it all to be, some of it turned out to be, well, you wouldn't call it a Pink Salmon, but I would call it semi-red salmon.

Q. In other words, it was mislabeled as Red Salmon, when in truth and in fact it was more like Pink Salmon?

A. That is true.

Mr. Whitney: That is all.

Redirect Examination

By Mr. Eubank: [338]

Q. Mr. Keeton, did you report this fact to the Food and Drugs Administration, Federal Food and Drugs Administration?

A. No, I am sure I didn't, Mr. Eubank. Certainly I discussed it with Mr. Hoffman.

Q. You do realize that that agency is there to protect the people against false labelling, do you not?

A. I do, sir.

Mr. Eubank: No further questions.

The Court: That will be all, Mr. Keeton.

(Witness excused.)

The Court: Do you have any more witnesses?

Mr. Eubank: Just one here, sir.

The Court: Call him.

## H. B. SCHURTZ

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

## Direct Examination

By Mr. Eubank:

Q. Your name is H. B. Schurtz?

A. That is right.

Q. And you are the owner and operator of  
Schurtz Produce Company? A. Yes, sir.

Q. And that is located in Hutchinson, Kansas?

A. Yes, sir. [339]

Q. Mr. Schurtz, do you recognize the name of  
Ben B. Hoffman? A. Yes, sir.

Q. Do you recognize the name of Acme Distribut-  
ing Company of Mesa? A. Yes, sir.

Q. How do you recognize that name, Mr.  
Schurtz?

A. Well, Mr. Hoffman called up by phone and  
said it was Acme Distributing Company.

Mr. La Prade: For the record, may we object,  
and move it be stricken. No identification of the  
caller.

The Court: We will see about that later. Go  
ahead.

Q. (By Mr. Eubank): Now, in regard to the  
telephone call, Mr. Schurtz, could you identify the  
exact date?

A. It was last May, our records show last May.

Mr. La Prade: What year was that?

The Witness: In May of 1954. It was 1954.

(Testimony of H. B. Schurtz.)

Mr. Eubank: May this be marked for identification?

The Clerk: Government's Exhibit 48 for identification.

(Said telephone bills and check were marked as Government's Exhibit 48 for identification.)

Q. (By Mr. Eubank): This phone call, how did it come? Was it prepaid, or a collect call? [340]

A. It was a collect call.

Q. And the person that received it, or, the person that you received it from, how did they identify themselves?

A. He said it was Acme Distributing Company of Mesa, Arizona.

Q. I show you Government's Exhibit 48 for identification, and ask you if you recognize those documents?

A. Yes, sir.

Q. And what are those documents?

A. They are our telephone bills for the month of May, 1954.

Q. And what is the other document attached thereto?

A. That is our check in payment of the telephone bill.

Q. And how are these bills kept at your office?

A. I keep them in the phone book, and then they check them against the telephone bill when we get it each month.

Q. And how long do you retain this particular telephone slip?

(Testimony of H. B. Schurtz.)

A. We usually keep them several years.

Mr. Eubank: I ask that Government's Exhibit 48 be admitted in evidence.

Mr. Whitney: May I ask a question on voir dire?

The Court: All right.

Q. (By Mr. Whitney): Do you know Mr. Hoffman personally? [341] A. No, sir.

Q. Never talked to him? A. No, sir.

Mr. Whitney: I object to it on the grounds there is no identification of the caller.

The Court: It may be received.

The Clerk: Government's Exhibit 48 in evidence.

(Said telephone bills and check were received in evidence and marked as Government's Exhibit 48.)

Q. (By Mr. Eubank): Looking at Government's Exhibit 48 in evidence, can you place the exact day of the telephone call?

A. It was the 21st of May. This is the call here. Phoenix.

Q. Were there any subsequent calls to this one?

A. No, this is the first call. No, this was the second. The 21st was the first, I think. This is the 21st, yes. That is right.

Q. Were there any other calls?

A. There was a call about a week later.

Q. What date exactly was that?

A. That was the 29th.

(Testimony of H. B. Schurtz.)

Q. Now, the first call, would you read to the jury the place that is listed that it came from?

A. It is listed here as Phoenix. [342]

Q. And on the second call, would you list the designation? A. It is listed Mesa.

Q. Now, in regard to the first call, Mr. Schurtz, will you please tell the jury what was said by Mr. Hoffman?

A. Well, they called and wanted to buy some chickens, dressed chickens. And he talked to Mrs. Schurtz at first, because I was busy on the other phone when the call came in.

Q. Now, did you talk to him on the first call at all?

A. Yes, sir. She talked to him a while, and then I got in on the conversation when I got through with the other phone call, and he said he was Ben Hoffman of Acme Distributing Company.

Q. That is when you got on the phone?

A. That is right. I was on the phone at the same time she was. We have an extension in the office.

Q. I see. All right. Now, when you were talking to Mr. Hoffman personally, that is the conversation we are interested in. What did Mr. Hoffman say to you?

A. Well, he had given an order for some chickens.

Q. How many?

A. And she, you know, wanted to know whether we should ship him. I said we don't know him, and he said—and I heard this on the phone—that this

(Testimony of H. B. Schurtz.)

fellow in Albuquerque told him about us, and that is how he called to buy the chickens. [343]

Q. Do you remember the name?

A. The Broadway Poultry Company, in Albuquerque.

Q. And had you done business with them before?

A. Yes, sir.

Q. And had you had satisfactory relations with them? A. Yes, sir.

Q. On the basis of that phone call, what was the amount of poultry ordered?

A. It was four barrels. He wanted it right away, and we weren't in a position to ship right away, so we shipped him one barrel the next day, and followed up a couple of days later with the other three barrels by Express.

Mr. Eubank: May these be marked as exhibits?

The Clerk: Government's Exhibits 49 and 50 for identification.

(Said copies of Invoices were marked as Government's Exhibits 49 and 50, respectively, for identification.)

Q. (By Mr. Eubank): Mr. Schurtz, what were the terms?

A. Our terms are cash, but we shipped to Broadway Poultry, and they remitted on arrival.

Q. In the discussion with Mr. Hoffman, did you discuss payment terms?

A. Yes, sir, he agreed to pay on arrival.



(Testimony of H. B. Schurtz.)

Q. Have you ever received any payment for these? [344]

A. We received no word at all, or payment.

Q. I show you Government's Exhibits 49 and 50 for identification, and ask you if you recognize these documents? A. Yes, sir.

Q. Will you tell the jury what that document is.

A. This is a copy of the original shipment or invoice to him on the first bill.

Q. How were those kept in your office?

A. We kept them on file.

Q. And have those been on file since that date?

A. That is right, just the same as we keep all our records.

Q. And the Exhibit 49, when was that, when did you bring that with you?

A. I just brought it with me now.

Q. Okay. Looking at Exhibit 50, Government's Exhibit 50, for identification, do you recognize that document?

A. Yes, this is the additional 3 barrels shipped 3 days later. That is a copy of the original. The original was mailed with the shipment, with the Express Receipt.

Mr. Eubank: I ask that Government's Exhibits 49 and 50 be admitted in evidence.

Mr. Whitney: Objection as not properly identified. Immaterial.

The Court: Objection overruled.

The Clerk: Government's Exhibits 49 and 50 in evidence.

(Testimony of H. B. Schurtz.)

(Said copies of invoices were received in evidence and marked as Government's Exhibits 49 and 50.) [345]

Q. (By Mr. Eubank): Showing you Government's Exhibit 49 in evidence, I ask you to relate the contents of the first shipment.

A. 40 hens, that is chickens, 162 pounds, at 41c a pound, that is dressed and drawn. They were ice packed and shipped by express.

Q. And what particular express company, do you know? A. American Railway Express.

Q. Now, looking at Government's Exhibit 50, what were the contents of that?

A. Three barrels, 120 hens, 519 pounds, 41c.

Q. Now, would you relate first, as to Exhibit 49, what the date of that shipment was?

A. It is May 25th, 1954.

Q. And what was the date of the second shipment?

A. This was the second one. The first one was May 22nd, 1954.

Q. Now, Mr. Schurtz, have you ever been paid for this shipment? A. No, sir.

Q. In regard to the second telephone call, what was the content of that conversation?

A. Well, the phone call came in about a week later. As far as I know, I think this was the call that was on there, and he wanted ten more barrels, and I told him we couldn't supply him, [346] be-

(Testimony of H. B. Schurtz.)

cause we had regular orders, you know, that was taking about all the poultry.

And I asked him about the payment on the first one, and he said he would get it right out, and we never did hear any more.

Q. You never did receive it?           A. No.

Q. Did Mr. Hoffman ever tell you that the merchandise was faulty?

A. Never told us anything. We never heard anything more. He was going to pay for this first shipment, which we never heard from.

Mr. Eubank: No further questions.

The Court: Is that all from this witness?

Mr. La Prade: No questions.

The Court: That will be all.

(Witness excused.)

The Court: Do you have any more witnesses now?

Mr. Eubank: No, sir.

The Court: All right, the Court will stand at recess until ten o'clock in the morning.

(Thereupon, an adjournment was taken to the following day, Friday, September 21, [347] 1956.)

September 21, 1956—10:00 A.M.

The Court: You may continue.

Mr. Eubank: I will call Mr. Hayward.

W. C. HAYWARD, SR.

called as a witness in behalf of the Government,  
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is W. C. Hayward, Sr?

A. W. C. Hayward, Senior, yes, sir.

Q. And you are the owner of Hayward Special Products?      A. Yes, sir.

Q. And that is a cannery?

A. Canning plant, yes.

Q. In Hohen Solms, Louisiana?

A. Hohen Solms, Louisiana, yes.

Q. Mr. Hayward, do you recognize the name of Ben B. Hoffman? [348]

A. I certainly do.

Q. Do you recognize the name of Ben B. Hoffman Wholesale Grocers?

A. I recognize the name that he gave me.

Q. What name was that, sir?

A. He gave me Ben B. Hoffman, Wholesale Grocer.

Q. In relation to Mr. Hoffman, would you please tell the jury how you know that name?

A. On August 10, he rang me and wanted to know if I had any preserves.

Mr. La Prade: May we make our objection to the conversation as irrelevant, no foundation or identity.

The Court: All right.

(Testimony of W. C. Hayward, Sr.)

Q. (By Mr. Eubank): When you say "rang you," what do you mean by that?

A. He rang me up by telephone, from Tucson.

Q. What type of call was that? Was that a prepaid or a collect call?

A. A collect call.

Mr. Eubank: I would like these exhibits marked for identification.

The Clerk: Government's Exhibit 51 for identification.

(Said telephone toll bill was marked as Government's Exhibit 51 for identification.) [349]

Q. (By Mr. Eubank): Mr. Hayward, I show you Government's Exhibit 51 and ask you if you recognize these documents?

A. Yes. My telephone bills.

Q. Now, would you look at each one of them, each of the documents there? Look at all them. Are all of those your bills, too?

A. I think that is all.

Q. And how do you know that they are your bills?

A. Well, it is sent to me, W. C. Hayward, from the telephone company.

Q. And are these the ones you brought with you this morning in reply to a subpoena?

A. Yes, sir.

Q. Mr. Hayward, in regard to these bills, how were they kept by you, as far as your records are concerned?

(Testimony of W. C. Hayward, Sr.)

A. Well, I keep all my bills each year to itself, filed to themselves.

Q. And these particular telephone bills, what station are they billed to? Are these your home phone or office phone?

A. That is the home phone. Well, that is the office phone. They have no phone at the factory.

Q. And where exactly is your home phone located? A. Right in the hall of my home.

Q. The city and state? [350]

A. Hohen Solms.

Q. Louisiana? A. Louisiana, yes.

Q. Can you identify the exact date of the calls, the first call?

A. The first call from Mr. Hoffman was——

Q. One moment, can you identify the exact date of the calls from Mr. Hoffman by referring to these bills? A. Yes.

Mr. Eubank: I ask that Government's Exhibit 51 for identification be admitted in evidence.

Mr. Whitney: We object to the introduction of Government's Exhibit 51 for identification in evidence upon the grounds that this shows matters in August, 1953, whereas Count X of the Indictment states that it is in August, 1954, and that would be completely wrong.

The Court: That is what the indictment recites.

Mr. Eubank: Your Honor, evidently a transcribing error was made in the Indictment itself, and that the actual year which we can show was 1953.

(Testimony of W. C. Hayward, Sr.)

The Court: Well, I don't know what you are going to do about that.

Mr. Whitney: You can't change the indictment.

The Court: If it was an Information, you might do it, but not an Indictment. [351]

Mr. Eubank: Your Honor, the defendant was amply informed of his rights, because we have two counts against Mr. Hoffman in regard to the Hayward transaction.

Count IX is also against Mr. Hoffman, and it recites the proper date, that on or about the 13th day of August, 1953, in the District of Arizona, and so forth.

The Court: I see. All right, go ahead.

Mr. Eubank: I ask that Exhibit number 51 for identification be admitted in evidence.

The Court: It may be received.

The Clerk: Government's Exhibit 51 in evidence.

(Said telephone toll bill was received in evidence and marked as Government's Exhibit 51.)

Q. (By Mr. Eubank): Mr. Hayward, I show you Government's Exhibit 51 in evidence and ask you if you can determine by looking at these bills the exact date of the first telephone call from Mr. Hoffman?

A. August 10th, from Tucson. That is the first time I heard from him.

Q. That is the first conversation that you recall?

A. Yes.

Q. Now, in regard to that conversation, Mr.

(Testimony of W. C. Hayward, Sr.)

Hayward, would you please relate to the jury how Mr. Hoffman identified himself? [352]

Mr. La Prade: If the Court please, may I have the witness on voir dire for one question?

The Court: You may cross-examine in a minute. Go ahead.

The Witness: Hoffman rang me up on the evening of August 10th. He asked me if I had any preserves. I told him yes.

He asked me what kind. I told him I had seedless blackberry preserves, fig preserves, and some other preserves.

Well, he only wanted fig preserves and blackberry preserves. He asked me when I could get the truck out. It was a van. I think the van, the maximum shipping weight of the van was something like 40,000 tons. I don't remember exactly.

The Court: Tons or pounds?

The Witness: Pounds, I should say. Pardon me.

At any rate, he asked me when I could get it out. I said I could start loading immediately. We went down the following day——

Q. (By Mr. Eubank): Now, in regard to that first telephone call, what did Mr. Hoffman tell you about his business, or did you inquire about his business in Tucson?

A. Yes, I inquired about his business, in order to give him the correct price. He said he was the largest wholesale dealer in Tucson. [353]

Q. Did he say anything else about his business capacity in Tucson?



(Testimony of W. C. Hayward, Sr.)

A. Well, I can't exactly recollect exactly what he said, but I asked him what business he was in, and he said he owned the largest wholesale business in Tucson.

Q. Now, on the first telephone conversation, did he make any—or what was the terms that were discussed, if any?

A. Well, I asked him what business he was in in order to give him the correct price and terms.

Q. Would you explain that to the jury, where the price differential comes in?

A. Well, we generally give the wholesaler about 5% less than the retailer.

Q. I see.

A. And I gave him the wholesale price, with the understanding that he would discount his bill within ten days.

Q. Now, on that particular point, would you tell the jury the exact terms? In other words, when was the payment to be made?

A. Within ten days from the time that he received the billing.

Q. Now, if he paid within ten days, what benefit would he derive?

A. He would have derived one per cent.

Q. And if he didn't take advantage of that, the ten-day [354] one per cent, what would have been the period he would have had to have paid the bill in any event?

A. Thirty days.

Q. And was that agreed on over the telephone?

(Testimony of W. C. Hayward, Sr.)

A. I can't say it was agreed on, but it is a known fact that——

Mr. Whitney: I object to that, if the Court please.

The Court: Yes, don't state that.

Q. (By Mr. Eubank): Mr. Hayward, did you tell him over the telephone that those were the terms?

A. No, I did not tell him over the telephone. I told him it would be one per cent ten days.

Q. I see. Over the telephone you discussed the one per cent in ten days? A. Yes.

Q. What did Mr. Hoffman say to that?

A. He said he discounted all of his bills, and I needn't to worry about the payment of them.

Q. Now, in this first conversation did you require or request any correspondence or letter or mail from Mr. Hoffman?

A. I asked him when he first rang me up to confirm the order in writing.

Q. And did he confirm the order?

A. Yes. [355]

Mr. Eubank: Mark this Government's Exhibit 52.

The Clerk: Government's Exhibit 52 for identification.

(Said letter was marked as Government's Exhibit 52 for identification.)

Q. (By Mr. Eubank): Mr. Hayward, I show

(Testimony of W. C. Hayward, Sr.)

you Government's Exhibit 52 for identification, and ask you if you recognize that document?

A. Yes, there is my handwriting.

Q. Do you recognize it? A. Yes.

Q. And what is the document?

A. That is confirming the order that Hoffman ordered over the telephone.

Q. And as to the receipt of this letter, how was the letter received?

A. Well, there is no one opened the mail except my boy and I. It was opened by me or my boy.

Q. Do you know whether you opened this letter or not? A. I couldn't swear to that, no.

Mr. Whitney: I beg your pardon, I couldn't hear that.

The Witness: I could not swear to that, that I opened the letter. It was either opened by my boy or myself.

Mr. Eubank: I offer Government's Exhibit 52 for identification in evidence.

Mr. Whitney: Objected to on grounds there is no sufficient [356] proof of mailing under the statement of the witness, and no proof at all of mailing, and no foundation laid for its introduction.

The Court: You are probably right, but I will let it be received temporarily here. I think when we used to try these cases, we would have somebody. I can't remember how the mailing was proved.

The Clerk: Government's Exhibit 52 in evidence.

(Said letter was received in evidence and marked as Government's Exhibit 52.)

(Testimony of W. C. Hayward, Sr.)

Q. (By Mr. Eubank): Now, in regard to Government's Exhibit 52 in evidence, I ask you to look at the document, and ask you if that covers the terms that were discussed in the first telephone conversation? A. I rang him up.

Q. Now, are these the terms in the first telephone conversation?

A. Yes. Those were the terms, but after I started loading the truck——

Q. Okay. Now, would you read to the jury the letter that Mr. Hoffman wrote?

A. "Confirming your telephone conversation, you can ship me at once 500 cases of blackberry preserves in 12-ounce tumblers, at \$2.85 per dozen; 25 cases of fig preserves in 18-ounce [357] cans at \$3.10 a dozen. Thank you in advance. Yours truly, Ben Hoffman."

Q. And was this the amount that was ordered in the first telephone conversation?

A. That was the amount that was ordered in the first telephone conversation.

Q. Now, Mr. Hayward, would you tell the jury the method by which mail is received in your company?

A. Well, it is put in the box in front of our store, and the canning plant has a mailbox. The store has a mailbox, and then the colored people on the place have a mailbox.

Q. How many people work in your office?

A. In the office? About four.

(Testimony of W. C. Hayward, Sr.)

Q. And at this time, on August 13, 1953, do you recall how many worked there then?

A. We haven't had a very large force there. A stenographer, my two boys and myself.

Q. Who usually collects the mail from the mail delivery box? Is anyone assigned to that task?

A. Well, it is anybody that is interested in the factory, and put on my desk.

Q. And the mail is put on your desk?

A. Yes.

Q. Now, who in your company is authorized to open the incoming mail? [358]

A. My boy and I.

Q. Are you two the only ones that are authorized to open it? A. Yes.

Q. Is that a fact as of August 13, 1953?

A. Yes.

Q. Is that the way it was done then?

A. Yes.

Q. Now, in respect to that date, you have testified that you cannot recall opening this particular letter yourself?

A. Well, it was either my boy or I. He opens all the mail. I don't open any, because I am across the lake. He is running the factory.

Q. Do you recall of your own recollection the approximate date that this got into your hand?

A. No, I could not. I couldn't remember that.

Q. Do you remember in subsequent telephone calls to Mr. Hoffman referring to this letter?

A. Yes.

(Testimony of W. C. Hayward, Sr.)

Q. And do you recall whether it was the second or third telephone call?

A. Well, it was the third after he rang me.

Q. It was the third telephone call after he rang you?

A. Yes. And then I rang him.

Q. And in a conversation relating to this letter, did [359] Mr. Hoffman make any statement regarding the letter? Did he say anything concerning it, do you recall?

A. No, I don't recall that he said anything.

Q. Now, Mr. Hayward, we have pretty well completed the conversation in the first telephone call.

In regards to the second telephone call, can you testify the date?

A. I rang Hoffman up.

Q. What date was that?

A. It was the 12th, I think.

Q. Would you consult Exhibit 51 in evidence?

A. The 12th.

Q. Now, what was the month?

A. August the 12th.

Q. August the 12th, 1953. And would you please tell the jury the nature of that conversation?

A. I rang him up to increase, to get his permission to increase the truck to its maximum load.

Q. What was the reason for increasing the truck's maximum load?

A. Well, it wouldn't have cost any more in freight to put the maximum load on.

Q. And what would the maximum load have been?

A. I can't offhand tell you exactly.

(Testimony of W. C. Hayward, Sr.)

Q. In that conversation would you relate what Mr. Hoffman [360] said to you?

A. Why, he was very much disturbed, because I didn't prepay the freight on the first load.

Q. Now, this is on August 12th. Had you already made a shipment?

A. No, I rang him asking him to increase the order.

Q. That is right. On August 12th?

A. On August 12th.

Q. On August 12th, what did Mr. Hoffman say to you when you were talking about increasing the shipment?

A. He asked me if I could get out another load. I told him yes, I would get out another load just as soon as I would receive his check. And he then gave me hell, if I express it right——

Q. That is all right.

A. For not prepaying the freight.

Mr. Eubank: Mark this as Government's Exhibit 53 and Government's Exhibit 54 for identification.

The Clerk: Government's Exhibits 53 and 54, respectively, for identification.

(Said Invoice and said Bill of Lading were marked as Government's Exhibits 53 and 54, respectively, for identification.)

Q. (By Mr. Eubank): Mr. Hayward, I now show you Government's Exhibit 53 [361] for identification, and ask you if you recognize that document?

A. That is my writing.

(Testimony of W. C. Hayward, Sr.)

Q. And what document is that, or what type of document?      A. That is a bill.

Q. What type of a bill? I mean, how is that used in your company?

A. Well, I don't quite understand.

Q. This evidently is one of your company forms?

A. Yes, Hayward Special bill.

Q. How do you use that in regard to your shipments made?      A. I just mail it out.

Q. Is there any technical name for this type of paper that is used in the trade?

A. No, it is just a billing, that is all.

Q. Could it be also called an invoice?

A. Invoice, a billing invoice.

Q. In regard to this billing, do you recognize this particular document?

A. Yes. It is my handwriting. I wrote it.

Q. And in what relation do you recognize it, as far as this case is concerned?

A. What relation I——

Q. Yes, in other words, what relationship does this document have to this case? This is United States versus Ben Hoffman. [362]

A. Well, it is an unpaid bill. That is all I know, it is an unpaid bill.

Q. And the billing is to whom?

A. Ben Hoffman.

Q. Does this contain the terms of the shipment to Mr. Hoffman?      A. No, it does not.

Q. Does it contain the amount?

A. Yes, the amount.



(Testimony of W. C. Hayward, Sr.)

Mr. Eubank: I ask that Government's Exhibit 53 be introduced in evidence.

Mr. La Prade: We object to its introduction. No foundation laid that it was ever received by the defendant.

The Court: It may be received.

The Clerk: Government's Exhibit 53 in evidence.

(Said Invoice was received in evidence and marked as Government's Exhibit 53.)

Q. (By Mr. Eubank): And now, Mr. Hayward, showing you again Government's Exhibit 53 in evidence, is this the original of this statement?

A. Yes.

Q. This is the original? A. Yes.

Q. And were any copies made at that time?

A. We always keep a copy. [363]

Q. And was any of these sent with the shipment? A. Yes.

Q. Which copy, or which one?

A. Well, the second copy was sent. The original was sent to the customer, and a copy was filed away.

Q. Now, which one is this?

A. That is a copy.

Q. This is the copy? A. Yes.

Q. Is this the one that was filed away?

A. Yes.

Q. Now, I show you Government's Exhibit 54 for identification, and ask you if you recognize this document? A. That is my writing.

Q. Do you recognize the document?

(Testimony of W. C. Hayward, Sr.)

A. Yes.

Q. And how do you recognize it?

A. Well, it is transportation, shipping transportation, Herrin Transportation Company, and we shipped all the preserves out by the Herrin Transportation.

Q. Would you tell me if this is an original or a copy?      A. This is a copy, I guess.

Q. And where on this type of thing does the original usually go?

A. The original is supposed to go to the [364] shipper.

Q. How many of the copies do you retain?

A. Of these we retain two.

Q. And is this one of the copies that you retain?

A. Yes.

Q. How does this shipment relate to this case?

A. Well, he ordered 500 cases of blackberries.

Q. You say he. Who is that?      A. Hoffman.

Q. And is this that shipment?

A. Yes. I have increased it 100 with his permission.

Q. Right.

Mr. Eubank: I ask that Government's Exhibit 54 for identification be admitted in evidence.

Mr. Whitney: Object to it on the grounds no foundation is laid, and not binding on the defendant.

The Court: It may be received.

The Clerk: Government's Exhibit 54 in evidence.

(Testimony of W. C. Hayward, Sr.)

(Said Bill of Lading was received in evidence and marked as Government's Exhibit 54.)

Q. Now, looking at Government's Exhibit 54 in evidence, Mr. Hayward, will you please recite to the jury the amounts that were shipped, and the place from which they were shipped to where?

A. The amount of this?

Q. On your shipment, yes. [365]

A. There was 600 24/12 oz. tumblers blackberry preserves; 25 cases 24/13 oz. cans of preserved figs.

Q. They were shipped from what point?

A. They were shipped from Hohen Solms, the factory, to Tucson.

Q. And consigned to whom?

A. To Ben B. Hoffman, Tucson, 1610 South 4th Avenue.

Q. And that is in Arizona? A. Yes.

Q. Now, going back to the telephone conversations that you testified having with Mr. Hoffman, was there a third telephone conversation between you and him?

A. Well, in Waveland, I rang him up and I think I spoke to his secretary, or his wife, I don't know who, trying to find out when he was going to pay for that car of preserves.

Q. In that regard, Mr. Hayward, was that the call that was on August 25th? You can consult the Exhibit 51, Government's Exhibit 51. Would you define the date?

A. August 17th. Oh, yes, on August 25th he

(Testimony of W. C. Hayward, Sr.)

hadn't paid the bill, and he led me to believe that he was going to discount the bill, and he was very much disturbed, said he wanted another carload of preserves.

Q. On August 25th, he asked for another order, is that correct? A. Yes. [366]

Q. Was there any explanation made of why the bill had not been paid at that time?

A. He told me the check had been made out, and he didn't know why his stenographer hadn't mailed it.

Q. And was there anything else said about the shipment?

A. Yes. He was very much disturbed because I didn't pay the freight on the first carload, and he wanted another carload immediately.

I told him I would ship him another carload as soon as I received the money for the first carload.

Q. And did you ever receive the money in payment for your first account? A. Not yet.

Q. Referring to Government's Exhibit 56, would you read to the jury the amount of your initial billing?

A. 600 cases of seedless blackberry preserves in tumblers at \$2.85, \$3,420.00.

25 cases of 24/12 oz. fig preserves in tin at \$3.10 per dozen, \$155.00; total, \$3,575.00.

Q. Now, subsequent to the call of August 25th, have you ever received any payment, any part payment on this shipment? A. No.

(Testimony of W. C. Hayward, Sr.)

Q. Were there any other telephone calls made by you to Mr. Hoffman after August 25th?

A. I rang him up from Waveland, [367] Mississippi.

Q. Can you tell us the date of that call from looking at those? A. September 26th.

Q. On that call, would you please relate to the jury the conversation you had?

A. I hadn't spoken to Hoffman after I spoke to him to increase the order, and I never could get him. I spoke to his wife or secretary, I don't know who.

Q. How about August 25th? You mean since August 25th you haven't spoken to Ben Hoffman personally? A. No.

Q. That you know of? A. No.

Q. Actually, you have never seen Mr. Hoffman, have you, Mr. Hayward?

A. I have got his picture.

Q. And from that picture, could you identify him in this courtroom? A. Yes.

Q. Would you point him out to the jury, please?

A. Right straight back of you.

Q. What color coat does he have on?

A. It looks kind of reddish to me. I don't know.

Q. Now, Mr. Hayward, in regard to the receipt of the letter that you identified as receiving from Mr. Hoffman, would [368] your shipment have been made if you hadn't received the letter? Would it or wouldn't it have?

A. I think it would have. I would have saved

(Testimony of W. C. Hayward, Sr.)

100 cases of blackberries if I had shipped before I received—oh, before I received the letter?

Q. Yes.

A. Oh, no. I held the shipment up until I got that letter.

Q. Now, what was the signature of this letter to you? Why did you hold the shipment up until you received the letter?

A. Well, a new customer, we generally have them to confirm the order by letter.

Q. And why is that?

A. Merely for our record, I guess. I don't know. A misunderstanding over the phone, or something. There are sometimes some misunderstanding over the phone.

Q. Okay. And after August 25th, you never heard from Mr. Ben Hoffman again? A. No.

Q. Is that correct? A. That is correct.

Mr. Eubank: No further questions.

### Cross-Examination

By Mr. La Prade:

Q. Mr. Hayward, what date were the preserves shipped, can [369] you tell?

A. August the 17th.

Q. And you have testified that the phone call, the first phone call that was placed to you from a Mr. Hoffman was on the 10th day of August, 1953?

A. Yes.

Q. Now, do you know whether in fact your son

(Testimony of W. C. Hayward, Sr.)

received a phone call before you did, and then you returned the call to discuss the business transaction?

A. You mean in ordering the preserves?

Q. No, sir. I mean, did your son first receive a phone call from Tucson?

A. I don't think my son ever spoke to him. I don't think so. Not that I know of.

Q. You have a phone bill in your hand, sir?

A. Yes.

Q. You say you never did receive any token payments? A. Not a dime.

Q. In other words, you never shipped any merchandise on account of having received some payment? You only made one shipment, is that right?

A. Yes, that is all.

Q. And was the order placed when you called him, or when he called you? Can you clarify that for me, sir?

When did he order the merchandise? [370]

A. On August 10th.

Q. On the phone when he called you, or would you consider this your order for the merchandise?

A. Well——

Q. I am referring to Government's Exhibit 52 in evidence.

A. Ordinarily, now, we ship quite a lot of preserves to Houston, Texas. If they order by phone, why, if it is a complicated order, why, I might ask them to confirm it. At the same time, I may ship them without the confirmation.

Mr. La Prade: No other questions.

(Testimony of W. C. Hayward, Sr.)

### Redirect Examination

By Mr. Eubank:

Q. Mr. Hayward, in regard to new business, would you state again your custom as to new business, requiring writing?

A. Well, we have very, very few new customers, and naturally if we should get a new customer, we would like to know a little about him, and we might ask for some recommendation, or what kind of business he is in.

In fact, Hoffman is about the only new customer we have had in the last ten or twelve years.

Q. How long have you operated the plant, Hayward Special Products?

A. About forty years.

Mr. Eubank: No further questions.

Mr. La Prade: That is all.

(Witness excused.) [371]

Mr. Eubank: At this time, your Honor, as there is some doubt of the letter form, I ask that the jury be allowed to compare the letter received by Mr. Hayward and the letter previously identified as Exhibit 15.

The Court: Are they both in evidence?

Mr. Eubank: Yes, sir.

The Court: Show anything in evidence to the jury you want to.

Mr. La Prade: For the record, may I again object to these exhibits being demonstrated to the



jury, for the reason that they are both in the same category, neither one of them properly identified as being sent by the defendant.

The Court: All right.

Mr. Eubank: As you recall, ladies and gentlemen, Mr. Rouland Goodman testified——

Mr. La Prade: I object.

The Court: Yes. You can argue the case later.

Mr. Eubank: All right.

Mr. La Prade: I object to his explaining it to the jury.

The Court: All right. When you argue the case you explain it to them.

Mr. Eubank: All right.

I would like to call Mr. Edward R. Belton.

### EDWARD R. BELTON

called as a witness in behalf of the Government, having been [372] first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Edward R. Belton?

A. Yes.

Q. And you are the secretary and treasurer of Citizens Transfer and Storage Company?

A. That is right.

Q. And that is located in Tucson, Arizona?

A. Yes, sir.

Q. Mr. Belton, you are here under a subpoena duces tecum, is that right?           A. Yes, sir.

(Testimony of Edward R. Belton.)

Q. And also in regard to a certain shipment in storage of some Hayward Special Products?

A. Yes, sir.

Q. And that was in approximately August, 1953?

A. Yes, sir.

Q. Did you bring those documents with you?

A. I did. (Handing to counsel.) Those are the receipts we deliver the merchandise from.

Q. These are all the deliveries?

A. Yes, sir.

Mr. Eubank: I ask that this be marked as Exhibit 55 for identification. [373]

The Clerk: Government's Exhibit 55 for identification.

(Said Freight Bills were marked as Government's Exhibit 55 for identification.)

Q. (By Mr. Eubank): Showing you Government's Exhibit 55 for identification, I ask you if you recognize these documents? A. Yes, sir.

Q. Will you tell the jury what the documents are?

A. First there is a freight bill issued by the Brazwell Motor Company who hauled the merchandise into Tucson and delivered it to us. There were 599 cases of——

Q. That is all right.

A. This is merely a memo copy to keep the inventory. This is a copy of our receipt.

Q. Do you recognize the bill form?

A. Yes, sir; this is my own handwriting.

(Testimony of Edward R. Belton.)

Q. The next one?

A. Yes, sir; that is my own handwriting.

Q. And the next one?

A. It supports these. Yes, sir; it is a bill of lading issued by the Southern Pacific Freight Line.

Q. And what does this set of documents represent in your company's records?

A. It represents the receipt of this merchandise, and the delivery of the merchandise from these documents. [374]

Q. You can tell the dates you received the merchandise and the dates you disbursed it?

A. That is right.

Q. And in this particular filing, it relates to whom, what party or what company?

A. Well, this was a shipment received from the Hayward Special Products Company, via the Brazwell Freight Line.

Q. For whom?

A. It was consigned to Ben B. Hoffman, care of our company.

Q. And this particular file relates, does it, to this individual, or to that individual?

A. No, sir, the goods was stored for account of Ben B. Hoffman.

Q. Thank you.

Mr. Eubank: I ask that Government's Exhibit 55 be admitted in evidence.

Mr. La Prade: Your Honor, for the record, we object to the introduction of Exhibit 55 in evidence on grounds that it is hearsay, incompetent, irrele-

(Testimony of Edward R. Belton.)

vant, and immaterial, and not binding on the defendant.

The Court: It may be received.

Mr. Eubank: If your Honor please, I would like to eliminate a lot of these extraneous records. All we are interested in showing is just the—— [375]

The Court: Why did you have them marked, then?

Mr. Eubank: There are so many of them, I thought it might save time, but I notice there are some extraneous documents.

The Court: You better sit down and withdraw those from your exhibits.

We will have our morning recess while he does it.

(The morning recess was had.)

The Court: You may continue.

Q. (By Mr. Eubank): Now, in regard to Government's Exhibit 55 for identification from these documents, can you determine the dates, the exact dates that goods were received by you and goods shipped by you in regard to Ben Hoffman and Hayway Special Products?

A. Yes, sir. We received this——

Q. You can determine? A. Yes, I can.

Mr. Eubank: I now offer Government's Exhibit 55 in evidence.

The Court: All right. He deleted some of it?

Mr. Eubank: Yes.

Mr. La Prade: We object to its introduction on

(Testimony of Edward R. Belton.)

the ground it is not connected with the defendant, neither is it relevant or material to this case. [376]

The Court: All right, it may be received.

The Clerk: Government's Exhibit 55 in evidence.

(Said Freight Bills were received in evidence and marked as Government's Exhibit 55.)

Q. (By Mr. Eubank): Referring now to Government's Exhibit 55 in evidence, can you tell or give us the date that you received, and the quantity that you received, and the date that you shipped Haywards Special Products?

A. Yes, sir. We received through the Brazwell Motor Freight Lines 599 cases of 24/10 oz. tumblers blackberry preserves, and 25 cases of 24/12 oz. canned fig preserves on August 24, 1953.

On that same date we delivered our delivery receipt No. 22301, 200 cartons of blackberry preserves, to the Goodman Grocery Warehouse at Tucson.

On August 25th, we shipped by the Southern Pacific Company on our receipt No. 22302, 10 cases of blackberry preserves to the Simpson Market at Tempe.

Mr. Eubank: No further questions.

### Cross-Examination

By Mr. La Prade:

Q. Mr. Belton, do you know of your own knowledge what happened to the balance of those preserves? A. Yes, sir. [377]

Q. What?

(Testimony of Edward R. Belton.)

A. They were delivered to the Brice Company. They came to the warehouse and picked them up. You mean the balance?

Q. Yes. How did that happen, do you know?

A. What do you mean, how did it happen?

Q. By virtue of what did Brice get them, and when. You have testified there was a Sheriff's sale.

A. They were replevined and sold at a Sheriff's sale.

Q. In other words, the balance of that shipment was never delivered to anybody else, or for Mr. Hoffman, or anybody else? A. No.

Q. It was just on an attachment or execution of Sheriff's sale, is that right?

A. Yes, that is all.

Mr. Eubank: No further questions.

The Court: That will be all.

(Witness excused.)

### ROULAND GOODMAN

recalled as a witness in behalf of the Government, having been previously duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Rouland Goodman?

A. Yes, sir.

Q. And you were before the jury two days ago, I believe? [378] A. Yes, sir.

Q. And that was in regard to Brice pickles?

(Testimony of Rouland Goodman.)

A. Yes, sir.

Q. Now, Mr. Goodman, you are the owner and operator of Goodman's Market, and as I recall, you identified Mr. Ben Hoffman? A. Yes, sir.

Q. Now, do you recall any purchases of Hayward Special Products blackberries from Mr. Hoffman? A. Some preserves, yes, sir.

Mr. Eubank: Mark this as Government's Exhibit 56 for identification.

The Clerk: Government's Exhibit 56 for identification.

(Said documents were marked as Government's Exhibit 56 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 56 for identification, and ask you if you recognize those documents? A. Yes, sir.

Q. And how do you recognize these documents?

A. It has been received on our receiving form and signed by our warehouse foreman at the time.

Q. And this first item, that is your foreman's signature?

A. That is our foreman's signature.

Q. Now, the second document, do you recognize that? [379]

A. Yes, it is the invoice for the merchandise. Yes, it has been stamped Paid.

Q. And the third document, you say that is your form? A. That is our receiving form.

Q. Now, in regard to these documents, Mr.

(Testimony of Rouland Goodman.)

Goodman, how are they kept, again, by your company?

A. When our foreman receives merchandise, he has a receiving form to write it down on which he files, which is supposed to match up with the freight bill, which is supposed to match up with the invoice.

Q. These documents here are in that regard, is that right?      A. Yes.

Mr. Eubank: I offer Government's Exhibit 56 in evidence.

Mr. La Prade: We object to its introduction on the grounds it is irrelevant and immaterial, no connection with this defendant.

The Court: It may be received.

The Clerk: Government's Exhibit 56 in evidence.

(Said Invoice, and so forth, were received in evidence and marked as Government's Exhibit 56.)

Q. (By Mr. Eubank): Now, referring to Government's Exhibit 56 in evidence, do you recall the conversation that preceded your purchasing this item with Mr. Hoffman?

A. I don't recall. [380]

Q. Is there anything you do recall about the transaction?

A. I remember of buying it from him. That is about the extent of it.

Q. Now, will you please read to the jury the amount of purchases that you made at this particular time?



(Testimony of Rouland Goodman.)

A. There was 200 cases of 24/12 oz. Hayward's Special Seedless blackberry preserves.

Q. What was the date they were received?

A. On the 8/25/53.

Q. That is August 25th? A. Yes.

Mr. Eubank: Mark this Government's Exhibit 57, please.

The Clerk: Government's Exhibit 57 for identification.

(Said check was marked as Government's Exhibit 57 for identification.)

Q. (By Mr. Eubank): I show you Government's Exhibit 57 for identification, and ask you if you recognize that document? A. Yes.

Q. And how do you recognize the document?

A. It is made out on our—it is our check, company check of which I have signed. I recognize my own signature, which states on it what it was in payment of.

Q. Now, is it possible from that check to relate it to a particular purchase? [381]

A. Well, yes, this has the invoice date and the amount, and exactly what was on the invoice.

Mr. Eubank: I ask that Government's Exhibit 57 be admitted in evidence.

Mr. La Prade: Object to it, your Honor, as hearsay, irrelevant and immaterial, in connection with this defendant.

The Court: It may be received.

The Clerk: Government's Exhibit 57 in evidence.

(Testimony of Rouland Goodman.)

(Said check was received in evidence and marked as Government's Exhibit 57.)

Q. (By Mr. Eubank): Now, looking at Government's Exhibit 57, and looking at Government's Exhibit 56, can you tell the jury what the check is in payment of?

A. The check is in payment of 200 cases of preserves at \$3.70 a case, \$740.00.

Q. Does it relate to Government's Exhibit 56 in evidence?

A. Yes, it is in payment of this merchandise received at that time.

Mr. Eubank: Thank you. I have no further questions.

The Court: Will that be all from this witness?

Mr. La Prade: No questions.

(Witness excused.)

Mr. Eubank: I would like to call Mr. John [382] Glass.

### JOHN L. GLASS

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Eubank:

Q. Your name is Mr. John L. Glass?

A. Yes, sir.

Q. And in what capacity do you serve with the C. A. Glass Company?      A. President.

(Testimony of John L. Glass.)

Q. Mr. Glass, this company is located at 7001 East 7th in Los Angeles, California, is that correct?

A. As of that particular time it was 1701 East 7th. We are now 735 East 4th Street.

Q. How long have you been with the company?

A. Since 1938.

Q. Mr. Glass, do you recognize the name of Ben B. Hoffman?      A. Yes.

Q. Do you recognize the name of Acme Distributing Company?      A. Yes.

Q. How do you recognize these names?

A. I don't understand your question.

Q. The particular names, have you met these people before personally, or how have you heard of Ben B. Hoffman and Acme [383] Distributing Company?

A. Well, the first I had heard of the Acme Distributing Company was from a phone call placed at my office, a collect phone call to me.

Q. And approximately what is the date, if you recall, of that?      A. October 11th, 1955.

Mr. Eubank: I ask that these be marked as exhibits.

The Clerk: Government's Exhibit 58 for identification.

(Said toll slips, etc., were marked as Government's Exhibit 58 for identification.)

Q. (By Mr. Eubank): Referring to Government's Exhibit 58 for identification, I ask you to

(Testimony of John L. Glass.)

look at each of the documents there and tell the jury whether you recognize the documents?

A. I recognize these documents.

Q. And how do you recognize the documents?

A. Well, there are checks and both of these are our checks, and these are telephone bills for October-November, 1955.

Q. And how are those records kept by your company?

A. Well, they are filed. They are filed under a voucher system, check voucher system.

Q. And these particular copies, how long are they kept?

A. Oh, we have got them back about 15 years, all of our [384] checks.

Q. And are these those exact copies that you keep in your record?      A. Yes, sir.

Q. In regard to these telephone bills, can you tell by referring to the bills the exact date of the collect call you have mentioned?      A. Yes.

Mr. Eubank: I ask that Government's Exhibit 58 for identification be admitted in evidence.

Mr. Whitney: We object to this on the grounds previously made, that there is no showing who the caller was, no identification.

The Court: All right, it may be received.

The Clerk: Government's Exhibit 58 in evidence.

(Said toll slips and copies of checks were received in evidence and marked as Government's Exhibit 58.)

(Testimony of John L. Glass.)

Q. (By Mr. Eubank): Now, referring to Government's Exhibit 58 in evidence, will you refer to the toll slips and find out the exact date of the first telephone call?

A. Here it is in here, October 11th.

Q. And would you read to the jury the toll station on that charge?

A. It says PNX, which stands for Phoenix, C, \$2.30. [385]

Q. And the date again? A. October 11th.

Q. Now, regarding this phone call, would you state what you remember that Mr. Hoffman said to you?

A. Well, the phone call came in to the secretary, and they referred a collect call to me, my office, because he says, my secretary said to me, "There is a collect call from Phoenix. Do you want to take it?"

I said, "I'll take it." And the conversation went something like this, in fact, it did go like this:

"This is the Acme Distributing Company, Ben Hoffman speaking. Johnnie, you must remember me. I met you about a year ago down in the market."

I said, "Oh, yes." I said that because we have a lot of——

Q. That is all right.

A. Customers. You don't want me to say any more?

Q. No. A. All right.

(Testimony of John L. Glass.)

Q. Now go ahead with what he said.

A. Then he said, "Some of my boys this time of year have been getting some calls for California dates, now that it is October and the holiday season, and we think we could probably move quite a few down here for you. I have seen some in some of the stores here, and they look pretty good. Could you give [386] me a quotation of prices?"

And I quoted him a certain price on a certain pack, 24 one-pound case, also a date-nut confection in a 2½-pound pack.

So then he said, "Well, you better send down a sample of it." I have forgotten at this time exactly how many, but I believe it is in our ledger what was shipped. And he said, "So we can see how the merchandise is." I said, "Okay, I'll do that."

He said, "Okay, Johnnie, I'll see you later."

Q. And that was the termination of the first telephone conversation? A. Yes.

Q. And were the goods shipped?

A. Yes, they were shipped that day.

Q. Now, if you were to refer to the ledger sheet of your company, could you tell the exact amount of the shipment? A. Yes, sir.

Q. And the terms at that day that you quoted?

A. Yes, sir.

Q. Referring to Government's Exhibit 18 in evidence, I ask you if you recognize that document?

A. Yes. It is our ledger sheet.

Q. By your ledger sheet, you mean your company's?

(Testimony of John L. Glass.)

A. That is right. It is the ledger sheet of the C. A. Glass [387] Company.

Q. Referring to the ledger sheet, Mr. Glass, can you tell the date of the first shipment?

A. October 11th, 1954.

Q. And can you tell the amounts shipped in that shipment?

A. There is 25 Gold Cup brand natural, 24 1-pound dates—this isn't the billing, this is the ledger, so it just shows total amount.

And 25 Gold Cup brand hydrated dates, 12 3-pounders, and he has got notations in here in small letters of the prices.

25 Gold Cup hydrated 12-3's.

Q. And what was the total amount of the charge?

A. On this shipment there was 25 and 25. He is doubled on the lines here. There was 50 cases, and the amount was \$291.00.

Q. Now, if you saw your company invoices, would that help you in identifying the actual terms?

A. Yes.

Q. I show you Government's Exhibit in evidence 19, and ask you if you recognize these documents?

A. Yes. That is our billing.

Q. Now, in regard to the billing, can you determine from that document the amounts of the first shipment?

A. Yes. [388]

Q. And what were the amounts?

A. Well, there was 25 Gold Cup natural, 24 1-pound dates at \$4.44 a case, \$111.00; and 25 Gold

(Testimony of John L. Glass.)

Cup hydrated, 12 3-pound cases of dates at \$7.20 a case, \$180.00, total \$291.00.

Q. Now, in regard to your conversation with Mr. Hoffman, were the specific terms of payment discussed? A. No, they weren't discussed.

Q. Was there any reason why you did not discuss the terms of payment with him?

A. Yes, because generally when we talk to a customer, we don't discuss terms. We have an industry terms.

Q. Did you believe this man to be a customer, or a member of the industry?

A. I believed him to be a customer and a member of the industry.

Q. And what did he say that led you to this belief?

A. Well, in Los Angeles, there was over years past, in my experience of 15, 18 years, there has been three or four Acme Distributing Companies, from some place. I probably sold 5,000 different customers, but I know in my memory when someone says to me, This is Acme Distributing Company, it comes out of my memory that there was a customer by that name. So there wasn't any doubt in my mind when somebody was calling and placing an order, there was just no reason to doubt that he wasn't in business, or that he was—I don't know what the [389] word would be.

Q. Now, were any payments ever made on the—well, was this first shipment the only shipment made by your company to Mr. Hoffman?



(Testimony of John L. Glass.)

A. No, we made further shipments.

Q. These shipments were made from which office or plant of your company?

A. Well, they were probably made from our Del Monte plant where the dates are packed, our office being in Los Angeles, and probably they were shipped directly from the plant to the trucking line.

Q. In the first telephone conversation, was there any mention made by Ben of a shipper to be used?

A. Yes, I asked him how shall we ship them, and he said, "send them down to Watson Brothers trucking lines, and they will take them from there."

Q. Now, was any payment ever made on the first shipment and the subsequent shipments made by you? A. One payment was made.

Q. Do you recall the date of that payment, and the type of payment it was?

A. I don't recall the date without seeing the ledger, but I recall the type of payment.

Q. What was that type of payment?

Mr. Whitney: I object on the ground that is not the best [390] evidence. He should have some record of it.

The Court: If he knows.

The Witness: The type of payment was Cashier's Check.

Mr. La Prade: This has been testified to already.

The Court: I don't remember.

Q. (By Mr. Eubank): In regard to the Cashier's Check, Mr. Glass, is there anything out of the

(Testimony of John L. Glass.)

ordinary with the payment in your business by a Cashier's Check?

Mr. Whitney: I object as immaterial.

The Court: I don't see the purpose either.

Mr. Eubank: I think his answer, your Honor, can demonstrate materiality.

The Court: When is he going to begin to answer?

Mr. Eubank: Right now.

The Court: We will see. Go ahead.

The Witness: You want me to answer?

Mr. Eubank: Yes, sir.

The Witness: The Cashier's Check, we never receive a Cashier's Check from any business. It is always a business check or a personal check. In fact, in years, I don't think we have ever received a Cashier's Check in payment of merchandise.

Q. (By Mr. Eubank): In the years you have been in this particular line of [391] merchandising, how many similar transactions have you, or how many transactions have you been in that you have received something like a Cashier's Check?

Mr. Whitney: I object to it as immaterial.

The Court: Something like a Cashier's Check?

Mr. Eubank: A Cashier's Check.

The Court: He may answer.

The Witness: I never received a Cashier's Check, to my knowledge, for payment of merchandise.

Q. (By Mr. Eubank): This is the first one you remember?           A. Yes.

Mr. Eubank: No further questions.

(Testimony of John L. Glass.)

Cross-Examination

By Mr. La Prade:

Q. Mr. Glass, you have related the conversation, for the most part, in all of the important portions of that conversation, is that right, to the best of your knowledge? A. Yes.

Q. And you stated that you had heard Acme Distributing Company before in your business in California, and you assumed it might be the same one, and for that reason you went ahead and shipped the merchandise, is that right?

A. That is right. [392]

Q. And you were relying upon your past recollection of having heard the name Acme Distributing Company, and an order being placed, and that was what prompted you to go ahead and make the shipment, is that right, sir? A. That is right.

Q. Wouldn't it be a fact that it was not, that there was not anything specifically promised you over the telephone which induced you to make the shipment, that is, by way of "I promise to pay you promptly," or anything like that? You haven't testified to any such conversation, and isn't it true that wasn't said? A. It was not said.

Q. As a matter of fact, you didn't even discuss the terms, isn't that correct?

A. No, because we never discuss the terms.

Mr. La Prade: That is all.

(Testimony of John L. Glass.)

Mr. Eubank: At this time, your Honor, there was Government's Exhibit 21 for identification, that was the application for the money order, the \$200 check that was identified by the bank, and this was identified at that time as part of the bank's record, and at this time I would like to offer it in evidence.

Mr. La Prade: If the Court please, there never was any testimony——

The Court: The signature was never identified? [393]

Mr. La Prade: Never identified who made the application.

Mr. Eubank: I believe under the Comparison Rule that the signature could be identified by the finders of fact.

The Court: You proved the defendant's signature here a good many times. Why don't you prove it in the right way?

Mr. Eubank: All right, sir.

Mr. Whitney: It is a Cashier's Check.

The Court: That is the application for it. You don't need this witness for that purpose, do you?

Mr. Eubank: No, sir, no further questions.

(Witness excused.)

The Court: With the testimony of this witness, that might be sufficient. I will receive the application.

Mr. Eubank: All right, sir.

The Clerk: Government's Exhibit 21 in evidence.

(Said Application for Money Order was received in evidence and marked as Government's Exhibit 21.)

Mr. Eubank: At this time, your Honor, we have no more witnesses to present, no more evidence to present.

The Court: You want to rest, then?

Mr. Eubank: Yes, sir.

The Court: All right.

Mr. Whitney: We have a matter to take up with the Court, if the Court pleases.

The Court: All right. The jury may be excused until [394] 1:30 this afternoon, and keep in mind the Court's admonition.

(Thereupon the jury retired from the court room.) [395]

(The following proceedings were had out of the hearing and presence of the Jury.)

The Court: All right.

Mr. La Prade: At this time, if the Court pleases, the defendant desires to make a motion for a judgment of acquittal on each and every count of the indictment, upon the general ground, first, that the Government has failed to support its allegations that there was a scheme to defraud; and, further, on each and every count, that even if a scheme to defraud was in fact made out, that the individual counts are not supported by adequate evidence that the defendant is the person who made the calls, or mailed the documents, the substance of the charge.

With your permission, your Honor, and I know this evidence has been lengthy, and it is in some bit of confusion; however, we have had an opportunity to weld it together, so to speak and I would like to first point out to your Honor that the meat of the charge in the so-called scheme as set out in the indictment is that the defendant used these names, Hoffman Wholesale Grocery and Acme Distributing Company, and made representations as follows, and I quote:

“That they were an active and responsible business concern, and that they had good credit ratings, and that the goods ordered would be paid for promptly and in full.”

I point out to your Honor, first, that not one witness [396] has testified that the defendant said to them that he had a good credit rating.

Second, that only one witness testified that the defendant said he would pay them promptly, and that was the gentleman from the chicken factory that testified yesterday, and in that count there was no evidence that the defendant ever received the chickens, or was connected in any way with having made the phone call.

Now, your Honor, we feel that the Government has further failed to show this scheme, in that, if you will recall Mr. Glass just now, on Count II, I believe, your Honor, has testified he shipped this merchandise relying on his own memory of things happening in the past. No promises made to him by the defendant; and that was the substance of it. It was a credit transaction of the defendant. They

didn't even discuss the terms. No promises made. Therefore, no illegal phone call.

We state that the Government, although they have shown isolated transactions, in the first place, they have not alleged that there was a continuing scheme, which we raised before on our motion to dismiss the indictment, that there was a continuing scheme, and as a result all these things took place. The Government has shown in all these transactions what can be explained as business failure, and nothing criminal has been made out. [397]

In particular, we feel they must prove on each count that these representations of this particular scheme they have alleged were made. Virtually every one of these witnesses has testified that the credit was not discussed. In fact, we know the credit was not discussed, or they wouldn't have ever shipped this merchandise. But no testimony that the defendant said, "I will pay you promptly and I have a good credit rating."

One witness testified the defendant said he was the largest grocer in Tucson. That was today, referring to the count on Mr. Hayward.

Getting to these individual counts, your Honor. Count VI, I believe was dismissed. Count I, the Long's Date Gardens, your Honor will recall on the first testimony from Mrs. Darling that, and the prosecutor stated in his opening statement, was that the essence of this scheme was lulling payments in small quantities so they would produce further shipments. Mrs. Long testified, and I believe we adequately showed the check she received was after she

had made her last shipment. The envelope was dated the 13th, and I think it is obvious she didn't get it in Los Angeles until the 14th, and the last shipment was made on the 13th, so there couldn't have been any lulling involved; and I believe there is only one other account where there was anything that was paid and there was a later shipment, and that is referring [398] to the gentleman who testified today.

We feel that in Count I, a wire count, a long distance phone call, the Government has wholly failed to make out its case, the principal reason for which is that nobody has testified that they heard a voice which they recognized.

And in the second instance, nobody has testified that they heard the defendant make the call, or that they observed him make the call; therefore, there is no direct evidence. And referring to circumstantial evidence, I refer to the rule, your Honor, and I want to call your attention to the distinction between a person who has called at a number when you are trying to identify who answered the phone, that is one rule; and that which is stated in A. L. R. 135, page 332, as to the necessity for identifying the person called.

But where the telephone call is from an unknown number, and the person called answers and says who it is, any reply from the number from which the call comes would be pure hearsay.

Each of these phone calls you have permitted to go into evidence, and we have made this objection throughout. We feel circumstantial evidence that the



defendant received shipment of goods is certainly evidence he received it.

But we think it is mighty flimsy evidence——

The Court: Why would it be shipped? If a person testifies that the defendant called him and said, This is Hoffman, send me a certain number of crates of goods; the goods are shipped, and Hoffman received them. Why were they shipped? Did the person dream that all up? Or did Mr. Hoffman call them?

Mr. La Prade: I think that is one of the principal arguments. It goes to each count.

The Court: I don't see any merit. I don't want to hear any more about that.

Mr. La Prade: Referring to the scheme, your Honor, we feel the Government has wholly failed to show a criminal scheme.

When a man is in the wholesale distribution business, it refers to calls over the phone, particularly as shown today, the Brice Pickle man attached merchandise received from the Hayward Products Company, the preserves, and that, of course, can answer for the nonpayment of Mr. Hayward, for the reason Mr. Hoffman never got the merchandise, except for the 200 cases of Mr. Goodman. We feel it is just as easy to refer to all of these transactions as having been last-ditch efforts to survive the business world as it is of a criminal nature.

There is nothing shown that the defendant had a scheme and pursuant to the scheme he did these things. [400]

Assuming for the purpose of this argument that

there is sufficient evidence he did these things, there isn't any evidence that he didn't have any money in the bank. There isn't any evidence that he did. This testimony they brought out about a chair and a couple of tables, there isn't any need of evidence that he had a large establishment with many employees. There is nothing criminal about ordering merchandise over the phone direct, nothing criminal about buying merchandise and not being able to pay for it.

That is the whole substance of this case. This is a case where they are trying to use the federal court as a collection agency.

The Court: I have heard enough argument. I will deny your motion at this time.

The Court will stand at recess until 1:30.

(Thereupon the noon recess was taken.) [401]

September 21, 1956, 1:30 P.M.

The Court: You may continue.

Mr. Whitney: If the Court pleases, the defendant rests.

The Court: All right. Did you want to make a motion?

Mr. Whitney: Yes, your Honor.

The Court: The Jury may retire from the courtroom.

(The following proceedings were had out of the hearing and presence of the Jury.)

Mr. Whitney: Now, then, if the Court pleases, we again move the Court for an order dismissing the

indictment upon the grounds that in the indictment the scheme is shown to be on or about the 29th day of May, 1953, that that is the day advised, and that there is no allegation in the indictment that this is a continuing scheme, either up to the date of the indictment or up to the last mailing, or the last telephone conversation.

On that ground we move the indictment be dismissed.

The Court: All right. Motion denied. [402]

Mr. Whitney: Now, if the Court please, we move the Court to enter a judgment of acquittal on each and every count of the indictment, first, upon the grounds that there is no proof of the scheme as laid in the indictment, as there is no testimony, with the exception of two witnesses, that the defendant ever represented that he would pay promptly for the merchandise. There is no evidence that he stated that the companies had a good credit rating, and that the goods would be paid for promptly in full. Nor is there any evidence that represented these companies to be active and responsible business concerns.

And insofar as the counts referring to the Long Date Gardens, the letter which they said was a lulling letter, rather, the envelope containing the \$500 check was sent after the business was transacted, and no goods were ordered or sent after that date.

Now, that applies with reference to the telephone conversations to nearly all the other counts in the indictment, that there is no sufficient proof as to the identity of Hoffman.

As to the mailing, there is no proof of mailing, except as to Long's Date Gardens, and that the scheme as to her had at that time expired.

We think we should have a judgment of acquittal on each and every count of the indictment, and we reaffirm the [403] argument made on the original motion at the end of the Government's case.

The Court: The motion will be denied.

Call in the jury.

(Thereupon the following proceedings were had in the hearing and presence of the jury.)

The Court: You may argue the case.

(Thereupon Counsel for the Government and Counsel for the Defendant argued the case to the jury.)

The Court: The trial of this case will be resumed Monday afternoon at two o'clock. The Court will instruct you at that time.

In the meantime, you will not discuss the case among yourselves, or permit anyone to discuss it with you. Also avoid forming or expressing any opinion upon any subject connected with it. Keep that in mind.

You are excused until Monday at 2:00 o'clock.

(Thereupon an adjournment was taken to Monday, September 24, 1956, at 2:00 o'clock p.m.) [404]

September 24, 1956—2:00 P.M.

COURT'S INSTRUCTIONS TO THE JURY

\* \* \*

You are instructed that the phrase "false and fraudulent pretenses, representations and promises" as charged in the indictment means untrue and false words and conduct which are calculated to deceive and to induce action which would not be taken if the truth were known by the person [409] deceived.

If you find beyond a reasonable doubt that the defendant did in fact order the products set forth in the indictment, I instruct you that this constituted a promise and representation that the defendant intended to pay for the products ordered, but for such representation and promise to be considered false you must further find beyond a reasonable doubt that the defendant at the time he ordered the goods had no intention of paying for the products ordered.

\* \* \*

[Endorsed]: Filed December 3, 1956. [410]

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO  
RECORD ON APPEAL

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby

certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Benjamin B. Hoffman, Defendant, numbered C-13999 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of minute entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Indictment.
2. Defendant's Motion to Dismiss.
3. Minute Entry of November 28, 1955 (arraignment and plea).
4. Minute Entry of December 30, 1955 (order denying Motion to Dismiss).
5. Government's Bill of Particulars.
6. Minute Entry of September 21, 1956, of defendant's motions for judgment of acquittal and of orders denying the same.
7. Verdict.

8. Order Enlarging Time to file Motion for New Trial and Motion in Arrest of Judgment.
9. Defendant's Motion in Arrest of Judgment.
10. Defendant's Motion for New Trial.
11. Minute Entry of October 8, 1956 (orders denying motion in arrest of judgment and motion for new trial).
12. Judgment.
13. Defendant's Notice of Appeal.
14. Order Extending Defendant's Time to file record and docket appeal to and including December 20, 1956.
15. Designation of Contents of Record on Appeal.
16. Reporter's Transcript of Proceedings.

I further certify that the originals of Government's Exhibits 1, 2, 2a to 2m, 3, 3a, 3b, 4 to 8, 8a to 8t, 9, 10, 11, 11a, 12, 12a, 12b, 13 to 22, 22a, 22b, 22c, 23, 23a to 23d, 24, 25, 26, 26a to 26d, 27, 29 to 36, 36a to 36g, 37 to 41, 41a to 41d, 42, 43, 43a to 43c, and 44 to 58, in evidence; and Defendant's Exhibits A and B, in evidence, are transmitted herewith as a part of this record on appeal, as designated by appellant.

Witness my hand and the seal of said Court this 17th day of December, 1956.

[Seal]      /s/ WM. H. LOVELESS,  
Clerk.

[Endorsed]: No. 15391. United States Court of Appeals for the Ninth Circuit. Benjamin B. Hoffman, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed December 19, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Court of Appeals  
for the Ninth Circuit

No. 15391

BENJAMIN B. HOFFMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS  
ON WHICH HE INTENDS TO RELY

Comes Now appellant Benjamin B. Hoffman, through his attorneys undersigned, and herewith respectfully sets forth the following points upon which he intends to rely in the above-entitled case on appeal:

1. The indictment and each count thereof fails to state an offense against the United States.

2. Title 18, Section 1343, U.S.C.A., is unconstitutional, and appellant's conviction on Counts I, II, IV, V, VII, X and XI is null and void, for the reason that said statute is so vague, indefinite and uncertain that a person of common understanding would not understand same.

3. Failure of the District Court to direct a verdict of not guilty on each and every count of the indictment on which the appellant was convicted for the reason that the evidence was and is insufficient

upon which to base a verdict of guilty on each and all of the counts upon which appellant was convicted.

4. The admission, by the court below, of evidence oral and documentary over the objection that the proper foundation was not laid.

5. The admission, by the court below, of evidence oral and documentary over the objection that such evidence was irrelevant, incompetent and immaterial.

Respectfully submitted,

LOUIS B. WHITNEY,  
LORETTA WHITNEY,  
PAUL W. LA PRADE;

By /s/ LOUIS B. WHITNEY,  
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed December 29, 1956.

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[Title of Court of Appeals and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the parties to the above-entitled action, acting through their respective attorneys, undersigned, that all original exhibits contained in the record on appeal in the

above-entitled proceeding may be considered by the above-entitled Court in their original form without reproduction in the printed record.

Dated this 27th day of December, 1956.

LOUIS B. WHITNEY,  
LORETTA WHITNEY,  
PAUL W. LA PRADE;

By /s/ LOUIS B. WHITNEY,  
Attorneys for Defendant-Appellant, Benjamin B.  
Hoffman.

JACK D. H. HAYS,  
U. S. Attorney;

By /s/ WILLIAM E. EUBANK,  
Ass't U. S. Attorney.

[Endorsed]: Filed December 29, 1956.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 309

LECTURE 1

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No. 15,391

In the  
United States Court of Appeals  
*For the Ninth Circuit*

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BENJAMIN B. HOFFMAN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**Appellant's Opening Brief**

Appeal from the United States District Court  
District of Arizona

---

LOUIS B. WHITNEY

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FILED

APR 15 1957

PAUL P. O'BRIEN, CLERK



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No. 15391

In the

# United States Court of Appeals

*For the Ninth Circuit*

---

BENJAMIN B. HOFFMAN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

## Appellant's Opening Brief

Appeal from the United States District Court

District of Arizona

---

### NATURE OF CASE

The appellant (defendant in the Court below) was charged by indictment, filed on October 26, 1955, with violating the Mail Fraud Statute Title 18, Section 1341 U.S.C.A. and The Statute relating to Fraud by interstate wire, Title 18, Section 1343 U.S.C.A. (3-10).<sup>1</sup>

The indictment contained 11 Counts. Count VI was dismissed on motion of the United States Attorney. Counts I, II, IV, V, VI, VII, X and XI were for violation of Title 18

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1. Figures in parentheses refer to pages in printed Transcript of Record.

Section 1343, *supra*. Counts III, VIII and IX were for violation of Title 18, Section 1341, *supra*.

The case came on for trial on September 18, 1956, (26) and appellant was found guilty on all Counts (except Count VI) by a jury on September 24, 1956 (18). Motions in Arrest of Judgment and for New Trial were duly made and were by the Court denied (22). Judgment was entered on October 8, 1956 (23, 24). Notice of Appeal was filed October 18, 1956 (24, 25). The defendant is now imprisoned.

### **BASIS OF JURISDICTION**

The District Court had jurisdiction by virtue of the nature of the case, inasmuch as the offenses charged in the indictment were against the laws of the United States, and by the express provisions of Title 18, Section 3231 U.S.C.A. (62 Stat. 826).

This Honorable Court of Appeals has jurisdiction because this is an appeal from a final decision of a District Court of the United States, and such appeal is authorized by the express provisions of Title 28, Section 1291 U.S.C.A. (62 Stat. 929).

### **STATEMENT OF THE CASE**

#### **The Indictment**

#### **THE SCHEME.**

The indictment, insofar as the scheme is concerned, charges in substance that "on or about the 29th day of May, 1953" the defendant<sup>2</sup> "devised a scheme to obtain money and property by means of false and fraudulent pretenses and promises". The scheme set forth is that the defendant used the names of two companies "to place orders, outside the State and District of Arizona, on open account with

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2. The appellant will be designated in this brief either as "appellant" or "defendant".

various persons, firms and companies dealing in food and food products, and in placing said orders, the defendant represented that" the two companies were active and responsible business concerns, "with good credit rating and that the goods would be paid for promptly in full". It is then charged that the "aforesaid representations and promises were made to induce the persons, firms and companies to ship their merchandise to the defendant on credit". It is further charged that defendant knew that the two named companies were, in fact, not active and not possessed of a good credit rating, but were created by defendant to accomplish his scheme. That "token payments" were made on account to induce the sellers to further rely on the false representations and promises previously made. That the defendant converted said food and food products immediately into cash "by selling same, keeping the proceeds for his own use and benefit" (3-4). The foregoing is substantially the scheme alleged by the Government. It will be noted that the scheme alleged is not from "on or about the 29th day of May, 1953" to any given date or to the date of the finding or filing of the indictment.<sup>3</sup> In short, the scheme is not alleged to be a continuing scheme.

#### **THE GIST OF THE OFFENSES.**

Following the scheme in Count I is the gist of the offense under Title 18, Section 1343 U.S.C.A. which we will hereafter refer to as the "Wire Count" as distinguished from the "Mail Count" (Title 18, Section 1341 U.S.C.A.).

We will quote the gist of the "Wire Count" contained in Count I which is identical in verbiage with Counts II, IV,

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3. See Form 3 "Indictment for Mail Fraud" Appendix of Forms to Federal Rules of Criminal Procedure 18 U.S.C.A. page 612. While this form is illustrative, it does contain the bare *minimum allegations* in this kind of a case.

V, VII, X and XI except as to times, places and names of persons or companies from whom merchandise was ordered. The offense charged in Count I under the "Wire" Statute is that

"On or about the 23rd day of November, 1954, in the District of Arizona, the defendant Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone Long's Date Gardens in Pasadena, California, and place an order for food products, viz., dates, to be delivered to the Acme Distributing Company, Tempe, Arizona, *and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.*" (Emphasis ours.)

It will be noted that in all the "Wire" Counts, this language appears at the end of each Count:

"\* \* \* and in furtherance of said scheme did make the fraudulent representations and promises aforesaid."

The "mail" Counts (III, VIII and IX) are more orthodox. Count III charges the mailing by defendant of a cashier's check for \$500.00 at Phoenix, Arizona, addressed to "Long's Date Gardens", Pasadena, California (5-6). Count VIII charges the defendant with the mailing at Tucson, Arizona, of a request for samples addressed "R. O. Kelley Cannery" at Midville, Georgia (8). Count IX charges the defendant with mailing, at Tucson, Arizona, a confirmation of an order for merchandise placed via long distance telephone (9), which was addressed to "Hayward's Special Products Company" in Hohen Solms, Louisiana.

These "mail" Counts will be discussed later on in connection with the evidence adduced in support thereof.

The Mail Fraud Statute and the Interstate Wire Statute are similar insofar as devising or intending to devise a

scheme to defraud is concerned.<sup>4</sup> In short, both statutes require a scheme to defraud to be shown prior to the mailing or the using of an interstate wire, as the case may be. Both statutes likewise also require that the mailing or telephoning, as the case may be, take place while the scheme is still in existence.

#### THE FACTS.

The facts given in a light more favorable to the Government show that defendant ordered merchandise by telephone from various persons and companies named in the "wire" Counts; that he received nearly all of the merchandise so ordered and did not pay for same. In some instances, however, payments were made on account. The merchandise was all sold to defendant on credit or on open account, and without (except in one instance) any investigation by the sellers of the credit standing of defendant, or the two companies named in the indictment. The Government did show in some instances, merchandise received by defendant was sold below the price it was invoiced to him. In the one instance where a credit investigation was made, a carload of peas consigned to defendant was stopped in transit and not delivered to defendant because of an adverse report on his credit rating (222, 223).

In all instances, in reference to the "wire" Counts, the Government failed to prove that the fraudulent representations and promises set forth in the scheme in Count I and realleged by reference in all the other Counts were made as alleged, or at all. We will epitomize in the Argument, *infra*, the evidence in the record on the "wire" Counts which shows that the defendant did not "make the fraudulent

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4. Sections 1341 and 1343 "are cast in substantially the same language". *U.S. v. Mercer*, 133 Fed. Supp. 288, 289 (Cal.).

representations and promises aforesaid”—that is to say, the representations and promises as set forth in the alleged scheme. We will also show that the “mail” Counts are without support in the evidence for the same and other reasons.

### QUESTIONS INVOLVED

1. Do the facts set forth in the first paragraph of Count I of the indictment (3-4) set forth a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises, where (a) there is no specific charge of a scheme to defraud “or intending to devise any scheme or artifice to defraud” and, (b) where the indictment is defective for failure to set out the particulars of the scheme to defraud, and (c) the alleged scheme is not a scheme to defraud? These questions were raised by Motion to Dismiss (11).

2. Does the indictment, by alleging that the defendant “on or about the 29th day of May, 1953 \* \* \* *devised* a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises” allege a continuing scheme beyond the date set forth in the indictment as the time when the scheme was devised? This question was also raised by Motion to Dismiss (11).

3. Are the “wire” Counts sustained by evidence sufficient for the jury to say beyond a reasonable doubt that the defendant is guilty on the “wire” Counts in view of the express allegation in each of said “wire” Counts, to-wit, “and in furtherance of said scheme did make fraudulent representations and promises *as aforesaid*” where the evidence shows that such representations and promises were not made? Our contention in this behalf is that where there is no substantial evidence in the record to support a finding beyond a reasonable doubt, that the defendant made the



representations and promises as alleged in Count I and re-alleged in each and every other "wire" Count in the indictment relating to the use of an interstate wire for purpose of defrauding, a motion for judgment of acquittal should have been granted. This was raised by defendant's motion for judgment of acquittal on each and every Count of the indictment (17, 18, 373, 379).

4. Was the evidence sufficient to submit to the jury the question as to whether the defendant, beyond a reasonable doubt (a) mailed the letters, (b) that they were mailed in furtherance of the scheme as alleged?

It will be noted that the defendant is not charged with using a fictitious name or address in violation of Title 18, Section 1342 U.S.C.A.

5. The admissibility and sufficiency of the evidence to show identification of the defendant as the one who telephoned. This was raised by objections to the evidence and the motion for judgment of acquittal on the "wire" Counts.

6. The admissibility and sufficiency of the evidence with reference to all the "mail" Counts. This was raised by objections to the evidence and the motion for judgment of acquittal.

7. Did the court err when, after an objection was made by counsel for defendant to evidence on the grounds that no foundation has been laid, by making these statements:

"The Court: If they don't prove their case, I will direct a verdict.

Mr. Whitney: Thank you.

The Court: So don't interrupt just the minute a question is asked." (40)?

8. Does the indictment charge a conversion of personal property that is only punishable by state laws?<sup>5</sup>

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5. *U.S. v. Beall* (Cal.), 126 Fed. Supp. 363, 365.

**SPECIFICATIONS OF ERROR****I.**

The lower Court erred in denying appellant's motion for dismissal of each and every Count in the indictment, and in denying defendant's motion in arrest of judgment for the reason that the indictment and each Count thereof does not state facts sufficient to constitute an offense against the United States, in that (a) the scheme to defraud, as alleged, is not a continuing scheme, and (b) the scheme is not charged with sufficient particularity to enable the defendant to know the charge against him by direct and positive averment and not inferentially; (c) that said scheme alleged by the Government shows nothing more than transactions on credit; that the persons, firms and companies are not named in the alleged scheme, and no excuse is given for not naming them, such as "To the Grand Jury unknown".

**II.**

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case, and at the end of the entire case, as to Counts I, II, IV, V, VII, X and XI of the indictment for the reason (a) that the evidence was wholly insufficient to submit to the jury these particular Counts because the Government failed to prove that the defendant made the fraudulent representations and promises over the telephone as alleged in said scheme, and in furtherance thereof, as charged in each of said Counts.

**III.**

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case and at the end of the entire case as to Counts III, VIII and IX because (a) the evidence was insufficient to submit to the

jury the question beyond a reasonable doubt as to whether said mailings were made, or if made, were in furtherance of a scheme to defraud where the evidence clearly shows that the Government failed to prove the scheme as alleged, or at all and therefore, such use of the mails could not be in furtherance of a scheme to defraud, and (b) because if there was a scheme, it was consummated prior to the time the letters were mailed, and (c) because the entire evidence shows that the transactions were credit transactions and the placing of orders for goods in and of itself does not constitute the promises and representations charged in each Count of the indictment, and (d) because the matter mailed did not contain any representations whatsoever.

#### IV.

The lower Court committed prejudicial error in stating before the jury, after an objection had been made to evidence that if the Government didn't prove its case, he would direct a verdict, because the jury would be led to believe that if he did not direct a verdict, the defendant would be assumed guilty; the following is the objection and the Court's comments:

"Q. What did the person ask?

Mr. Whitney: If the Court please, I object to it on the grounds that no foundation has been laid for it. This is a different situation than if a man has an established phone.

The Court: If they don't prove their case I will direct a verdict.

Mr. Whitney: Thank you.

The Court: So don't interrupt just the minute a question is asked."

#### V.

The lower Court erred in admitting Government's Exhibit 51 in evidence for the reason that said Exhibit was a tele-

phone toll bill showing calls in August 1953 (334, 335), whereas Count X of the indictment (9) alleges the gist of the offense to have been committed on or about August 13, 1954.

## **ARGUMENT**

### **The Indictment Does Not State Facts Sufficient to Constitute An Offense Against the United States.**

#### **I.**

The lower Court erred in denying appellant's motion for dismissal of each and every Count in the indictment, and in denying defendant's motion in arrest of judgment for the reason that the indictment and each Count thereof does not state facts sufficient to constitute an offense against the United States, in that (a) the scheme to defraud, as alleged, is not a continuing scheme, and (b) the scheme is not charged with sufficient particularity to enable the defendant to know the charge against him by direct and positive averment and not inferentially; (c) that said scheme alleged by the Government shows nothing more than transactions on credit; that the persons, firms and companies are not named in the alleged scheme, and no excuse is given for not naming them, such as "To the Grand Jury unknown".

The scheme set forth in Count I of the indictment and realleged in each and every other Count, is not alleged to be a continuing scheme. Insofar as the time of its formation and duration is concerned, it is alleged that:

"on or about the 29th day of May, 1953, BENJAMIN B. HOFFMAN, \* \* \*, devised a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises; that the scheme so devised was substantially as follows: \* \* \*".

Count XI in the indictment charges that the defendant, for the purpose of executing the aforesaid scheme and artifice, did on the 29th day of May, 1953 by interstate wire telephone "T. L. Brice Company, Sherman, Texas," and place an order for food products "and in furtherance of

said scheme did make the fraudulent representations and promises as aforesaid" (10).

The alleged scheme does not cover any period of time other than the date that the scheme was devised; that is to say, it does not cover from the first telephoning and/or mailing to the last mailing, to-wit, 13th day of December, 1954. Count III shows the last date above mentioned (5, 6).

In nearly all of the cases we have examined, the scheme is alleged to be a continuing one or alleged from a date certain to a date certain, embracing all of the dates of the various uses of the telephone and of the mails. The United States Attorney in the court below insisted that the form suggested by the Supreme Court of the United States for an indictment for mail fraud does not have to be followed. We agree. We do insist, however, that there should be some allegation that the scheme was in existence when the gist of the offense was committed. We feel that the minimum requirements in charging a scheme to defraud and the time that it was in existence is contained in the Appendix to Forms of the Federal Rules of Criminal Procedure, 18 U.S.C.A. following Rule 60, which reads, insofar as the duration of the scheme is concerned, as follows:

"Prior to the ..... day of ....., 19....., and continuing to the ..... day of ....., 19.....,<sup>1</sup> the defendants, John Doe, \* \* \* devised and intended to devise a scheme and artifice to defraud \* \* \*".

On the footnote to this form appearing on page 613 of 18 U.S.C.A. Federal Rules of Civil Procedure, it is stated:

"<sup>1</sup> Insert last mailing date alleged."

Inasmuch as the interstate wire statute is cast in about the same language as the mail fraud statute, we assume that insofar as the charge in the indictment is concerned,

the same rules would apply to the "wire" Counts as would apply to the "mail" Counts. As before stated, in nearly all the cases the allegations with reference to the duration of the scheme is in the words suggested by the Supreme Court, or an allegation of the first date with the statement following "and continuing until the filing of this indictment." If we are correct on this particular point, then all Counts, with the exception of Count XI, should have been dismissed pursuant to defendant's motion.

The cases are unanimous in holding that if the scheme is consummated before the mailing of the letter, there is no crime. The same, of course, should apply to the use of an interstate wire. See *Kann v. United States*, 323 U.S. 88, 65 S. Ct. 148, 157 A.L.R. 406. *Dyhre v. Hudspeth* (10 Cir.), 106 F.2d 286 (cited with approval by the Supreme Court of the United States in the footnotes to the *Kann* case, *supra*).

The scheme set forth in Count I is vague and indefinite (72 C.J.S., page 358, "POST OFFICE"), and is not charged with sufficient particularity in that all the essential elements of the scheme are not alleged. If the scheme is not charged with sufficient particularity to enable the accused to know the charge against him by direct and positive averment and not inferentially, then the indictment is defective in substance and not even aided or cured by verdict. (72 C.J.S. *supra*, page 356, under heading "Description of Scheme".) *Benham v. United States*, 7 Fed. (2) 271.

The gist of the offense is the telephoning or mailing of the letters but telephoning and mailing of the letters without a scheme is not an offense; nor is the scheme in itself an offense unless the mailing or telephoning, as the case may be, is made for the purpose of executing the scheme. It cannot be before the devising of the scheme or after the scheme was consummated. The allegation in each of the Counts with

reference to the telephoning and mailing states that the defendant, Hoffman, "for the purpose of executing the aforesaid scheme and artifice \* \* \*" did either telephone or use the mail. All of these dates are subsequent to May 29, 1953, with the exception noted. In the *Kann* case, *supra*, it is pointed out in effect that the United States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. See Note 157 A.L.R. at page 248 under heading "When Fraudulent Scheme is Complete", citing several cases, including one from this Circuit.

The indictment is fatally defective because it does not state facts sufficient to constitute an offense against the United States as it does not set forth all the essential elements of the offense sought to be charged.

*U. S. v. Hess*, 124 U.S. 483, 8 S. Ct. 571, 573;

*U. S. v. Mercer, et al.*, (D.C. Cal.) 133 Fed. Supp. 288  
(Decided July 5, 1955);

*Fasulo v. U. S.*, 272 U.S. 620, 47 S. Ct. 200;

*U. S. v. Debrow*, 346 U.S. 374, 74 S. Ct. 113;

*Drown v. U. S.*, (9 Cir.) 198 F.2d 999, 1005;

*Elder v. U. S.*, (9 Cir.) 142 F.2d 199, 200;

72 C.J.S., page 358, "POST OFFICE".

The scheme should be charged with sufficient particularity to enable the accused to know the charge against him and must be by direct and positive averment and not inferentially. An indictment which fails to meet this requirement is defective in substance and not aided or cured by verdict (72 C.J.S. *supra*, page 356, under heading "Description of Scheme").

It will be noted that nowhere in this indictment is it stated, except by the barest inference, that the defendant devised a scheme to obtain money and property by means of fraud and fraudulent pretenses, representations and promises from the "various persons, firms, companies dealing in food and food products". In short, there is no allegation that this alleged scheme was to defraud anyone. There is not even an allegation that there was an attempt to defraud anyone.

The mail fraud statute (Title 18, Section 1341) as amended May 24, 1949, provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, and promises, \* \* \* for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, \* \* \* shall be fined \* \* \*."

In this indictment (which we will now break down) the draftsman attempted to set forth a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises. He then says "that the scheme so devised was *substantially* as follows":

(1) The defendant used the names of two companies, the Hoffman Wholesale Grocery and the Acme Distributing Company, to place orders, outside the State and District of America, on open account with various persons, firms and companies, dealing in food and food products;

(2) and in placing the said orders, the defendant represented that the Hoffman Wholesale Grocery *or* the Acme Distributing Company was an active and responsible business concern, within the State of Arizona, with good credit rating;



(3) and that the goods ordered would be paid for promptly in full;

(4) that the aforesaid representations and promises were made to induce the persons, firms, and companies receiving them to ship their merchandise to the defendant on credit;

(5) that the defendant well knew at the time the aforesaid representations and promises were made that the Hoffman Wholesale Grocery and the Acme Distributing Company were, in fact, not active and responsible business concerns in the State of Arizona, and not possessed of a good credit rating, but in truth and in fact, said companies were dummy business organizations with only nominal assets and created by the defendant to accomplish his scheme;

(6) and that the defendant further knew that the goods ordered and shipped to the Hoffman Wholesale Grocery and the Acme Distributing Company would not be paid for promptly in full;

(7) and the defendant did not intend to pay for said food and food products received, except to make token payments to induce the sellers thereof to further rely on the false representations and promises previously made;

(8) that as a further part of said scheme, the defendant converted said food and food products immediately into cash by selling the same, keeping the proceeds for his own use and benefit.

By examining this indictment the Court will readily see that it is so vague and indefinite that it cannot be said that a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises is set out. In *Postal Decisions*, 1939 edition, at page 237 under the heading "Devising a Scheme", it is said:

"The devising of some scheme or artifice to defraud, or to obtain money or property by fraudulent representa-

tions, etc., is the first ingredient of the offense, which becomes punishable when the mails are used in its execution or attempted execution. The words 'intending to devise' are the legal scales by which the scheme is to be weighed, and require that the intent and scheme to defraud shall exist at the time the mails are used. To devise a scheme or artifice to defraud is to form a plan, device, or trick to perpetrate a fraud upon another, and devising of it continues as long as the scheme is in process of execution. It is not necessary that accused be the inventor or originator of the scheme or artifice, which may be as old as falsehood, or that when the artifice was devised the schemers should have worked out all the details of its execution." (See *United States v. Corlin, et al.*, (D.C. Cal.) 44 Fed. Supp. 940 at 943.)

By the promulgation and approval by the United States Supreme Court of Form 3, Appendix of Forms, Federal Rules of Criminal Procedure, *supra*, it is made clear that it is indispensable that the indictment either (a) must allege ultimate facts which show that the scheme was, as a matter of fact, a scheme to obtain money or property, or (b) directly allege the conclusion "to obtain money and property". No count of the indictment does either.

In *Etheredge v. United States* (C.A. 5), 186 Fed. 434, 437, the Court in discussing the necessity of setting out clearly what the scheme and artifice was and wherein the fraud consisted, how it was to be accomplished, etc., said:

"It has been settled by repeated decisions that a good indictment under this statute must allege not only that the defendant had devised a 'scheme or artifice to defraud,' but it must also set out clearly what the artifice was wherein the fraud consisted, and how it was to be accomplished, and that charging the offense in the language of the statute alone is not sufficient. *United States v. Hess*, 124 U.S. 486, 8 Sup. Ct. 571, 31 L. Ed. 516; *Stokes v. United States*, 157 U.S. 187, 15 Sup. Ct.

617, 39 L. Ed. 667. Nothing in a criminal case can be charged by implication, but every fact must be clearly alleged. *Carll's Case*, 105 U.S. 611, 26 L. Ed. 1135; *United States v. Post*, 113 Fed. 852. The indictment must show clearly that the person charged has devised or intended to devise a 'scheme or artifice to defraud' \* \* \*".

According to the indictment and the allegation, that as a further part of the scheme, defendant converted the food and food products immediately into cash by selling the same and keeping the proceeds for his own use and benefit. This would indicate that the scheme then ceased and the telephone calls and the mail used were not in furtherance of the scheme to defraud. See *U. S. v. Dale* (D.C. Cal.), 230 Fed. 750, 751.

The names of the "various persons, firms and companies, dealing in food and food products" are not given, to say nothing of the failure to allege that it was intended to defraud them. If the various persons, firms and companies were all of a class then it would not be necessary to specify the names, but here it is charged that "the aforesaid representations and promises were made to induce the persons, firms and companies, receiving them to ship their merchandise to the defendant on credit". These persons, firms and companies should be described by name or a good and true reason given for the omission of the names such as an allegation that they are "to the Grand Jury unknown". This, of course, under the pleading would not be true. The Grand Jury under the allegations must have known the names of the persons, firms and companies receiving the telephone calls and the mail. The Court will note that this is not a stock selling scheme for the purpose to defraud purchasers of stock or the general public.

In 72 C.J.S., pages 358 and 359, under the heading "Designation of Persons" it is said that the indictment should

describe by name the individuals intended to be defrauded, or a charge of scheme to defraud the public generally *or a class of persons incapable of being resolved into individuals.*

*Corpus Juris Secundum* says:

“If the indictment does not charge a scheme to defraud the public generally, or a class not capable of being resolved into individuals, but clearly imports an intention to defraud definite individuals, it must describe them by name, or give a good and true reason for the omission, as that such names are to the grand jury unknown. An indictment is not defective as failing to give the names of the individuals intended to be defrauded or to allege that they were not known where it alleges that the scheme was to defraud, not an individual or group of individuals, but the general public or a class of persons not resolvable into individuals. \* \* \*”

See also *U.S. v. Weber*, 71 F. Supp. 88, 91; 41 *Am. Jur. Post Office*, paragraph 140 at page 793.

This last citation says:

“An omission, however, in an indictment for unlawfully mailing letters intended to defraud, to state the names of the parties intended to be defrauded \* \* \* is satisfied by the allegation, if true, that such names and addresses are unknown to the grand jury.”

As to the necessity of describing by name the individuals to be defrauded, see *Larkin v. U.S.*, 107 Fed. 697, 699. The Court used this language:

“The indictment in this case, it is to be observed, does not charge a scheme to defraud the public generally, or to defraud a class not capable of being resolved into individuals. So charged, it would be evident that the persons intended to be injured were not known, and there could, of course, be no necessity for an averment to that effect. The scheme alleged in this indictment was ‘to defraud divers other persons \* \* \* by

inducing those persons severally to send to him divers valuable articles, \* \* \* and to defraud thereof the several persons who should so send the same, \* \* \* a scheme and artifice which he \* \* \* intended to effect by opening correspondence and communication \* \* \* with the several persons so intended to be defrauded, and by inciting those persons to open communication with him.' These expressions clearly import an intention to defraud definite individuals, with whom it was intended to open correspondence, and who, therefore, by the settled rule of pleading, should have been described by name in the indictment, or a good and true reason given for the omission."

The last mentioned case cites *U.S. v. Hess, supra*, and *Durland v. U.S., supra*.

The three mail fraud counts (III, VIII and IX) are fatally defective. Each count alleges that defendant for the purpose of executing the scheme or artifice

"\* \* \* placed or caused to be placed in an authorized depository for mail matter at Phoenix, Arizona, to be sent and to be delivered by the Postal Establishment of the United States, a certain writing enclosed in a post paid envelope addressed to Longs Date Gardens, 2600 Foothill Boulevard, Pasadena 8, California, to-wit cashiers check \* \* \*". (Note: The above is from Count III, the other Counts VIII and IX being identical except as to place and the matter caused to be delivered, etc.)

These mailing counts are the gist of the offense. Nowhere in the indictment is it alleged that the defendant "wilfully and unlawfully" did what he is charged with doing. Nowhere is it alleged that he "knowingly" did anything. The statute (Section 1341, Title 18, U.S.C.A.) uses the words "knowingly caused to be delivered by mail according to the direc-

tions thereon". The Ninth Circuit in the *Wilkes* case (80 Fed. 2d 285 at 288) discusses this identical question. Judge Mathews held that where a count charges that the defendant "knowingly, wilfully and unlawfully" did the prohibited act there is no need to use the word "knowingly" twice in the same count. See also :

*Brady v. U.S.* (8 Cir.), 24 Fed. 2d 399 at 401 ;

*Postal Decisions* (1939), page 279 Section 60.

Seven "wire" Counts (I, II, IV, V, VII, X and XI) charge that defendant "did by interstate wire, telephone" a place (Counts I and III) or a "Company" (Counts II, IV, V, X and XI). You just do not telephone a "place" or a "Company". This is much too vague and indefinite. You telephone some "person" not a "Company". The "wire" Counts like the "mail" Counts must be precise. "Company" is a word of indefinite meaning (8 Words & Phrases, page 254 under "Company"). A company may be a corporation, partnership, joint adventure or may be some individual person carrying on a business under a company name (Websters International Dictionary 2nd Edition).

Section 1343 and Section 1341 are analogous. The mail fraud statute, (1341) should be used to construe the wire statute, (1343) especially insofar as alleging the gist of the offense is concerned, and this goes for the "scheme". Telephoning a "Company" or a "place" does not meet the requirements of what is to be alleged in clear terms in an indictment. (Construing the "wire" statute, see: *U.S. v. Mercer*, 133 F. Supp. 288, 289, 290.)

We respectfully submit that the Indictment and each Count thereof should have been dismissed.

## **The Verdict on the "Wire" Counts Is Unsupported by the Evidence.**

### II.

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case, and at the end of the entire case, as to Counts I, II, IV, V, VII, X and XI of the indictment for the reason that the evidence was wholly insufficient to submit to the jury these particular Counts because the Government failed to prove that the defendant made the fraudulent representations and promises over the telephone as alleged in said scheme, and in furtherance thereof, as charged in each of said Counts.

Defendant moved for judgment of acquittal at the close of the Government's case (17, 373) and at the close of all the evidence (18, 379). The motions were denied.

It is defendant's contention that there was no evidence sufficient to submit the case to the jury.

We realize that if the scheme is sufficiently set out in Count I, and the proof is sufficient on any Count that this Honorable Court will affirm because the sentence (5 years on each Count) runs concurrently.

We will now take up the "wire" Counts, and will attempt to show that none of these Counts were supported by evidence sufficient to be submitted to the jury.

It will be recalled that the indictment charges that as part of the scheme devised was that the defendant "in placing the said orders, \* \* \* represented that the Hoffman Wholesale Grocery or the Acme Distributing Company was an active and responsible business concern, within the State of Arizona, with good credit rating, and that the goods ordered would be paid for promptly in full; that the afore-said representations and promises were made to induce the persons, firms and companies receiving them to ship their merchandise to the defendant on credit; \* \* \*". These are the pretenses, representations and promises the Government relies on to show the scheme.

The gist of the offense in all the "wire" Counts is that the defendant for the purpose of executing the scheme and artifice, did by interstate wire, telephone the various corporations and persons named in the "wire" Counts and each Count *winds up with the language* "and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid". Assuming that the scheme is properly set forth, certainly this latter language at the end of that part of the Count that is the gist of the offense, would require that the Government prove beyond a reasonable doubt that the defendant made the fraudulent representations and promises set forth in the scheme. This the Government failed to prove.

The testimony relating to the gist of the offense, as far as Count I is concerned (if identification of defendant as the person telephoning is assumed valid), shows that a Mrs. Darling was the person the defendant telephoned, and on direct examination Mrs. Darling testified that the individual calling her asked if she had any dates to sell, to which "I told him I did, and then they told me the amount they would want, and we agreed on a price just by telephone only" (40, 41).

Q. What were the terms for the payment?

A. Well, it was just my understanding that 10 days or net 30, the way all of our other bills are paid.

Q. Did you discuss that over the telephone?

A. Not that I recall, but just from the talk on the telephone and everything, I just took it for granted that—

Q. Did he seem to know—well, state whether or not he appeared to you to know about this type of business?

A. Well, it sounded to me like he did.

Q. Is it the usual course, or, is it your usual course to grant credit to persons that call over the telephone in that manner?



A. We have, yes, but not on such a large scale, I didn't before.

Q. What was the factor that in this case caused you to grant credit of this amount?

A. Well, it was just his conversation, I would say (41).

A complete reading of Mrs. Darling's testimony will show that the defendant did no more than purchase the goods on credit and fail to fully pay for same. He did not make any of the pretenses, representations and promises charged in Count I. There is no evidence in the record to support Count I.

In Count II the gist of the offense is the telephoning to C. A. Glass Company of Los Angeles and placing an order for food products with the same allegation that in furtherance of said scheme the defendant did make the fraudulent representations and promises set forth in the scheme alleged in Count I (5).

Mr. John L. Glass, the President of the C. A. Glass Company mentioned in Count II, testified that he received a telephone call from the Acme Distributing Company on October 11, 1955 (363) \* \* \*.

Q. Now, regarding this phone call, would you state what you remember that Mr. Hoffman said to you?

A. Well, the phone call came in to the secretary, and they referred a collect call to me, my office, because he says, my secretary said to me, "There is a collect call from Phoenix. Do you want to take it?"

I said, "I'll take it." And the conversation went something like this, in fact, it did go like this:

"This is the Acme Distributing Company, Ben Hoffman speaking. Johnnie, you must remember me. I met you about a year ago down in the market."

I said, "Oh, yes." I said that because we have a lot of—

Q. That is all right.

A. Customers. You don't want me to say any more?

Q. No. A. All right.

Q. Now go ahead with what he said.

A. Then he said, "Some of my boys this time of year have been getting some calls for California dates, now that it is October and the holiday season, and we think we could probably move quite a few down here for you. I have seen some in some of the stores here, and they look pretty good. Could you give me a quotation of prices?"

And I quoted him a certain price on a certain pack, 24 one-pound case, also a date-nut confection in a 2½-pound pack.

So then he said, "Well, you better send down a sample of it." I have forgotten at this time exactly how many, but I believe it is in our ledger what was shipped. And he said, "So we can see how the merchandise is." I said, "Okay, I'll do that."

He said, "Okay, Johnnie, I'll see you later."

Q. And that was the termination of the first telephone conversation? A. Yes.

Q. And were the goods shipped?

A. Yes, they were shipped that day (365, 366) \* \* \*.

Q. Now, in regard to your conversation with Mr. Hoffman, were the specific terms of payment discussed?

A. No, they weren't discussed.

Q. Was there any reason why you did not discuss the terms of payment with him?

A. Yes, because generally when we talk to a customer, we don't discuss terms. We have an industry terms.

Q. Did you believe this man to be a customer, or a member of the industry?

A. I believed him to be a customer and a member of the industry.

Q. And what did he say that led you to this belief?

A. Well, in Los Angeles, there was over years past, in my experience of 15, 18 years, there has been three or four Acme Distributing Companies, from some place. I probably sold 5,000 different customers, but I know in my memory when someone says to me, This is Acme Distributing Company, it comes out of my memory that there was a customer by that name. So there wasn't any doubt in my mind when somebody was calling and placing an order, there was just no reason to doubt that he wasn't in business, or that he was—I don't know what the word would be (368) \* \* \*.

Q. Mr. Glass, you have related the conversation, for the most part, in all of the important portions of that conversation, is that right, to the best of your knowledge?

A. Yes.

Q. And you stated that you had heard Acme Distributing Company before in your business in California, and you assumed it might be the same one, and for that reason you went ahead and shipped the merchandise, is that right?

A. That is right.

Q. And you were relying upon your past recollection of having heard the name Acme Distributing Company, and an order being placed, and that was what prompted you to go ahead and make the shipment, is that right, sir?

A. That is right.

Q. Wouldn't it be a fact that it was not, that there was not anything specifically promised you over the telephone which induced you to make the shipment, that is, by way of "I promise to pay you promptly," or anything like that? You haven't testified to any such conversation, and isn't it true that wasn't said? A. It was not said.

Q. As a matter of fact, you didn't even discuss the terms, isn't that correct?

A. No, because we never discuss the terms. (371)  
This Count likewise is unsupported by the evidence.

Count IV relates to a telephone call to Grant-Whitman Company in Spokane, Washington, (6). Mr. Ehlinger testified on the phone call of June 14, 1954, as follows:

A. I first learned of the name through a collect phone call, and while I had my records, as I recall, the first call was on June 14th of 1954 (262) \* \* \*.

Q. Now, regarding the first telephone call on June 14th, would you relate to the jury how the person represented himself? First, who he was and who he represented?

A. The person represented himself—

Mr. Whitney: Wait a minute, I object on the grounds that the caller has not been identified. They have not put in any evidence from what phone this was from, except that he said so and so.

The Court: The caller said he was Hoffman. Isn't that true, Mr. Witness?

The Witness: Yes, sir.

The Court: All right, go ahead.

Q. (By Mr. Eubank): Now, explain just how he identified himself.

A. He identified himself as Mr. Hoffman of the Acme Distributing Company.

Q. Where? A. At Tempe, Arizona.

Q. Now, in regard to that, what did he inquire about?

A. He was inquiring for prices of salmon, and as a broker, we, of course, would check with our source of supply, and I told Mr. Hoffman—

Mr. Whitney: Wait a minute, not what you did, but what Mr. Hoffman did.

The Court: He is telling what he told Mr. Hoffman. Go ahead.

The Witness: I told Mr. Hoffman we would check with our supply source and that I would transmit quantities and prices by letter and wire, which I did. And for Mr. Hoffman to call me at a subsequent date. Mr. Hoffman called and said, "This is Mr. Hoffman—"

Q. (By Mr. Eubank): Wait a minute. That was the content of the first call?

A. That was the content of the first transaction.

Q. The first conversation?

A. Yes, first conversation.

Q. All right, now, was any other product discussed on that first conversation?

A. To my knowledge, there was not.

Q. He was interested mainly in sea products?

A. Mainly in seafood products, yes.

Q. After you received the phone call, what did you do then?

A. After I received the phone call, I wrote a letter to Mr. Gavin in Seattle requesting prices on the merchandise (265, 266).

Q. All right. Now, going to the first, or the second call of Mr. Hoffman, well, the first call, did he state anything about his business character?

A. Yes, he did. He represented himself as being in the wholesale grocery business.

Q. And did he make any other representations as to business in the first call, that you recall?

A. He referred to several firms as having done business with them, who we knew.

Q. And do you recall either of these firms he referred to?

A. I recall one in particular, because they are close friends of mine, and that is Soule-Gibbs, in San Francisco.

Q. And did you inquire as to his credit rating, or any item like that? A. We did not.

Mr. Whitney: At what time was this, now?

The Witness: Pardon me?

Mr. Whitney: What time are we talking about?

Mr. Eubank: This is the first call.

The Witness: This is approximately June 14th. (276, 277).

This Count is not supported by the evidence.

Count V charges a telephone call to Shurtz Produce Company, Hutchinson, Kansas (6, 7). The evidence on this Count with reference to the "fraudulent representations and promises" alleged in the scheme follows:

Q. I see. All right. Now, when you were talking to Mr. Hoffman personally, that is the conversation we are interested in. What did Mr. Hoffman say to you?

A. Well, he had given an order for some chickens.

Q. How many?

A. And she, you know, wanted to know whether we should ship him. I said we don't know him, and he said—and I heard this on the phone—that this fellow in Albuquerque told him about us, and that is how he called to buy the chickens.

Q. Do you remember the name?

A. The Broadway Poultry Company, in Albuquerque.

Q. And had you done business with them before?

A. Yes, sir.

Q. And had you had satisfactory relations with them?

A. Yes, sir.

Q. On the basis of that phone call, what was the amount of poultry ordered?

A. It was four barrels. He wanted it right away, and we weren't in a position to ship right away, so we shipped him one barrel the next day, and followed up a couple of days later with the other three barrels by Express (327, 328) \* \* \*.

Q. In the discussion with Mr. Hoffman, did you discuss payment terms?

A. Yes, sir, he agreed to pay on arrival.

Q. Have you ever received any payment for these?

A. We received no word at all, or payment (328, 329).

This evidence, like the other evidence, only shows a sale on credit and failure to pay.

Count VII charges a telephone call to R. O. Kelley Cannery at Midville, Georgia, for the purpose of placing a food order with the same allegations as to the representations and promises. In support of this Count, the Government offered the following evidence given by Mr. R. O. Kelley:

Q. Now, in relation to that Collect telephone call from Mr. Hoffman, would you relate the conversation you had with Mr. Hoffman?

A. As I recall, Mr. Hoffman wanted me to go ahead and ship him a truckload.

Q. And what happened?

A. And at that time our trucks were busy, and I asked to ship a small carload, that it would be very little difference in the number of cases, and he gave me permission to go ahead and ship this minimum carload.

Q. In that conversation, did you discuss at all his credit situation?      A. No, I didn't.

Q. Did you discuss any other terms than the terms that you had already discussed in the mail?

A. To my knowledge I didn't, other than just the standard terms, and I don't think they were mentioned.

Q. Is there any other statement you recall that Mr. Hoffman made at that particular occasion?

A. No, I do not recall (221).

Incidentally, Mr. Kelley first contacted Hoffman Wholesale Grocery by letter (215) which was received in evidence

over objection as Government's Exhibit 29 (216). The letter was addressed to Hoffman Wholesale Grocery, Tucson, Arizona, and states, in effect, that Mr. Holmes at Sandersville, Georgia, had given us (R. O. Kelley Cannery) your name with advice that Holmes was not in a position to furnish field peas with snaps due to a short pack. It then advises that Kelley is in a position to give all the 2's that you will want, and will be glad to quote you in carload lots f.o.b. Midville or Milan, Georgia, stating that if interested, he would be glad to furnish you (Hoffman Grocery Company) samples, with a statement that the Kelley Cannery was the oldest packer of field peas in the United States, and that all the pack is Government graded and stating, "we will hope to hear from you." This letter is set out *in haec verba* on page 217 of the Printed Transcript of Record. In reply to this letter, the defendant wrote Kelley the letter described in Count VIII, being a request for samples as per Government's Exhibit 30 in evidence (218). Government's Exhibit 30 was read into the record and reads as follows, omitting the address:

"Received your letter of August 20 advising me that you are in a position to supply me with number 2 peas. Would appreciate if you would furnish samples immediately, and then I will get in touch with you to see if we can work out a deal for a truckload or a carload.

Thanking you in advance. Yours very truly, Ben B. Hoffman" (219).

We realize that the letter may be ever so innocent, but if it is sent in furtherance of a scheme to defraud, an offense is committed. Of course, it was not sent in furtherance of the scheme, because none of the pretenses, representations and promises were made, and further, it was in response to Kelley's letter.



On cross examination, Mr. Kelley testified that he initiated the contact with the defendant (225) and that he had made a deal for a credit transaction and after finding out Mr. Hoffman's credit rating, changed his mind (226). He further testified on cross examination:

"Q. And you testified that no reference was made over the phone with regard to his credit, I mean, Mr. Hoffman's credit? That wasn't discussed very much? There wasn't any representations to you that he had an excellent credit rating or anything of that sort was there?

A. No, there was not any mention of it" (226).

This Count is likewise not in any way supported by the evidence.

Count X charges a telephone call on August 13, 1954 to Haywards Special Products Company, Hohen Solms, Louisiana, for the purpose of placing an order for food products with the same "fraudulent representations and promises" (9). Mr. W. C. Hayward, Sr. testified on this Count as follows:

Q. Now, on the first telephone conversation, did he make any—or what was the terms that were discussed, if any?

A. Well, I asked him what business he was in in order to give him the correct price and terms.

Q. Would you explain that to the jury, where the price differential comes in?

A. Well, we generally give the wholesaler about 5% less than the retailer.

Q. I see.

A. And I gave him the wholesale price, with the understanding that he would discount his bill within ten days.

Q. Now, on that particular point, would you tell the jury the exact terms? In other words, when was the payment to be made?

A. Within ten days from the time that he received the billing.

Q. Now, if he paid within ten days, what benefit would he derive?

A. He would have derived one per cent.

Q. And if he didn't take advantage of that, the ten-day one per cent, what would have been the period he would have had to have paid the bill in any event? A. Thirty days.

Q. And was that agreed on over the telephone?

A. *I can't say it was agreed on*, but it is a known fact that—(Emphasis ours.)

Mr. Whitney: I object to that, if the Court please.

The Court: Yes, don't state that.

Q. (By Mr Eubank): Mr. Hayward, did you tell him over the telephone that those were the terms?

A. No, I did not tell him over the telephone. I told him it would be one per cent ten days.

Q. I see. Over the telephone you discussed the one per cent in ten days? A. Yes.

Q. What did Mr. Hoffman say to that?

A. He said he discounted all of his bills, and I needn't to worry about the payment of them (337, 338).

It will be noted that the telephone call charged was on August 13, 1953 and the indictment sets the date as August 13, 1954. (See discussion on this feature on pages 334 to 335 of the Printed Transcript of Record.)

Count XI charges a similar telephone call to T. L. Brice Company, Sherman, Texas, on May 29, 1953. The same charge as to representations and promises is made (10).

Q. Would you please explain first when that telephone call was had?

A. It was on or about May 25th of 1953 (122) \* \* \*.

Q. What did Mr. Hoffman say? (123).

A. He wanted to know if he could buy some pickles, and wanted to know the price of the pickles and the delivery date of them.

Q. In regard to the pickles, what was the price that you quoted?

A. He bought several sizes which varied in price, the different sizes.

I remember one was quarts, and at that time I don't remember what the exact price was on them.

Q. What were the terms?

A. One per cent 10, net eleven.

Q. And what does that mean, for the benefit of the jury?

Mr. Whitney: I would like to have the answer to that last question.

The Witness: One per cent 10, net eleven.

That is to say, within ten days they get 1% cash discount off the invoice. If it isn't paid, the full amount of the invoice is due on the eleventh day.

Q. (By Mr. Eubank): Was this shipment based upon the phone call gotten together by your firm? I mean, was it shipped? A. Yes, sir.

Q. Now, in the conversation with Ben, did you inquire into his business?

A. Yes, sir. Let me clarify this one moment. On the first phone call I did not. There were other phone calls which we did inquire about his credit rating, and so forth (124).

Q. Approximately, these other phone calls, when were they made?

A. The shipment of pickles was made on or about the 8th of June, and it was between approximately the 25th, and the 8th of June, 1953.

Q. The other phone calls, what statements were made at that time by Mr. Hoffman?

A. We asked him in regard to his credit rating if he was listed in Dun and Bradstreet, which he was not.

We asked him to give us some references as to the people he was purchasing from at that time, which he referred to us Eastern Packers. And then we checked at Sherman on two food concerns that distribute their products in this area, if they had heard of Mr. Hoffman, and these people said that he might be the one that purchased James A. Dick Grocery Company, and I called Mr. Hoffman and asked him if he was the one that bought out the Dick Grocery Company, and he informed me he was at that time (123, 124) \* \* \*.

Q. This was a credit transaction, wasn't it, Mr. Brice?

A. That is right (133).

Q. And when you didn't collect it, when you couldn't collect it, you turned it over to whom?

A. To our attorney there in Sherman.

Q. And it was purely a civil matter, as far as you were concerned?

A. That is right.

Q. Just a matter of another account which had gone bad, as far as you were concerned, is that right?

A. That is right.

Q. That was your only interest?

A. That is right.

Q. As a matter of fact, you made an attachment on some other merchandise, didn't you?

A. That is right.

Q. And received your payment in full?

A. We came out about even on it.

Q. After receiving the, I believe it was the \$400 payment?

A. That is right.

Q. Was there any other merchandise ordered?

A. No, sir.

Q. And there was not any other shipped, was there?

A. No, sir.

Q. And the \$400 did not lull you into shipping any other merchandise, did it?

A. No, sir, it did not.

Q. This particular merchandise was ordered on what day, sir, do you recall?

A. On or about the 25th of May.

Q. 1953? A. That is right.

Q. And this is the shipping date on Government's Exhibit 13 in evidence?

A. It is on the right-hand side there.

Q. The shipping date would be June 4th?

A. That is right.

Q. A few days later? A. That is right.

Q. And you received payment of the \$400 when, sir?

A. I would estimate about two weeks later.

Q. This is the only order you actually received?

A. That is right.

Q. And none other after you received the check, isn't that right? A. Yes, sir.

Q. With reference to Government's Exhibit 14, Mr. Brice, I will ask you if this is the sum total of all the telephone statements you received for the time in question?

A. That is right.

Q. I will ask you to examine those telephone statements, referring to the month of May of 1953, and ask you if there appears thereon that you received any phone calls from Arizona during the month of May?

A. Yes, sir, I got one here in the month of May, on the 25th day of May.

Q. That is the one you referred to on direct examination? A. That is right.

Q. And that refers to the 25th day of May of 1953?

A. That is right.

Q. And you did not receive one on the 29th day of May of 1953, did you?

A. It is not on here. No, sir, there isn't one on here for that date (133, 134, 135).

This evidence is a far cry from being sufficient to send the case to the jury on this Count.

### **The Verdict on the "Mail" Counts Is Unsupported by the Evidence.**

#### **III.**

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case and at the end of the entire case as to Counts III, VIII and IX because (a) the evidence was insufficient to submit to the jury the question beyond a reasonable doubt as to whether said mailings were made, or if made, were in furtherance of a scheme to defraud where the evidence clearly shows that the Government failed to prove the scheme as alleged, or at all and therefore, such use of the mails could not be in furtherance of a scheme to defraud, and (b) because if there was a scheme, it was consummated prior to the time the letters were mailed, and (c) because the entire evidence shows that the transactions were credit transactions and the placing of orders for goods in and of itself does not constitute the promises and representations charged in each Count of the indictment, and (d) because the matter mailed did not contain any representations whatsoever.

Count III is a mail fraud Count. It charges that on or about the 13th day of December, 1954, the defendant for the purpose of executing the scheme set forth in Count I, placed, or caused to be placed, a cashier's check in the amount of \$500.00 payable to Long's Date Gardens enclosed in a post-paid envelope, and addressed to Long's Date Gardens, in Pasadena, California (5, 6).

If there was no scheme proven, or if the representations and promises were not made, this Count, like the "wire" Counts, was not proved. In short, what we have said con-

cerning Count I, *supra*, applies here. No scheme as alleged, or at all, was proven.

The evidence concerning Count III is that an envelope (49), Government's Exhibit 4, was identified as having been received by Long's Date Garden from Acme Distributing Company (50) and that it contained a check. The check was identified as a "cashier's check No. 27792" (51). The check is Exhibit 5 in evidence (55). It was identified as the check contained in the envelope (Exhibit 4) and was received by Mrs. Long or the Long Date Gardens (53, 54). The check was dated December 12, 1954, according to the indictment (6). The mailing is charged as being on December 13, 1954, and the envelope was dated the same day at 11:30 A.M. (71). The envelope, Exhibit 4, which contained the cashier's check, Exhibit 5, could not have possibly reached Long's Date Gardens until at least the 14th day of December, 1954. The witness admitted that much on cross examination (72). The last shipment was made on December 13 on order placed on the 11th (68, 69). Therefore, this payment on account could, under no stretch of the imagination, be termed a "lulling" payment.

This mail Count is wholly unsupported by any competent evidence.

Count VIII (8) is taken care of in our argument on Count VII, a "wire" Count relating to R. O. Kelley Cannery (see *supra*, pages 29-30 this brief). The "mail" Count is not based on any representations and promises as charged in the indictment. There is no representation in defendant's letter of August 24, 1953 (219). The defendant never heard of R. O. Kelley Cannery until he was contacted by that concern (217). There is absolutely no evidence upon which to base the offense of mailing in furtherance of a scheme to defraud as charged in this Count.

Count IX is likewise unsupported by any false and fraudulent representations and promises. There is also no competent evidence to support the mailing as charged (9). The evidence introduced by the Government as to the mailing of the letter by the defendant abstracted to the issue is that the letter, Government's Exhibit 52 for identification (339, 340) was recognized by the witness Hayward as confirming the order that Hoffman ordered over the phone; that no one opened the mail except "me or my boy" (339). "I couldn't swear that I opened this letter." Whereupon the Government offered Exhibit 52 for identification and evidence, which was received over the following objection:

"Mr. Whitney: Objected to on grounds there is no sufficient proof of mailing under the statement of the witness, and no proof at all of mailing, and no foundation laid for its introduction.

The Court: You are probably right, but I will let it be received temporarily here. I think when we used to try these cases we would have somebody. I can't remember how the mailing was proved."

The witness then read the letter to the jury (340). The following questions were asked by the United States Attorney and the following answers given:

"Q. Now, in respect to that date, you have testified that you cannot recall opening this particular letter yourself?

A. Well, it was either my boy or I. *He opens all the mail. I don't open any*, because I am across the lake. He is running the factory. (Emphasis ours.)

Q. Do you recall of your own recollection the approximate date that this got into your hand?

A. No, I could not. I couldn't remember that" (341). Irrespective of the absence of any scheme or false and fraudulent representations and promises, the evidence as



to the mailing of this letter is wholly insufficient, and the objection should have been sustained or in all events, a motion for judgment of acquittal should have been granted.

The evidence here clearly shows that each of the persons whom the defendant telephoned was an individual, and a separate conversation was had with him alone. Each of said persons, if defrauded by fraudulent representations and promises, constituted a separate scheme. *Dyhre v. Hudspeth, supra*; (distinguished in *U. S. v. Lowe*, 2 Cir., 15 F.2d 596, 599).

It is necessary in this kind of a case that the Government prove that some of the representations set forth in the indictment were made and were false. *Ballard v. U.S.*, 9 Cir. 138 F.2d 540, 545. (Reversed on other grounds, *U.S. v. Ballard, et al*, 322 U.S. 78, 64 St.Ct. 882).

The three mailings charged in the indictment, as will be noted in and of themselves contain no representations or promises whatsoever. This is not a stock selling scheme where the Government is sometimes permitted to roam at large, nor is this a charge where worthless or forged checks are placed in the mail for the purpose of defrauding. The instant case was tried upon the theory that if the defendant ordered the products set forth in the indictment, *that in itself constituted a promise and representation that the defendant intended to pay for the products ordered* (381). The lower Court instructed the jury further, that

"\* \* \*, but for such false representations and promises to be considered false, you must further find beyond a reasonable doubt that the defendant at the time he ordered the goods had no intention of paying for the products ordered" (381).

If this were the law, it would be dangerous for anyone to order goods for fear that if he did not pay for same, he

would be charged with a violation of the mail fraud or wire fraud statute.

The defendant, of course, took no exceptions to the Court's charge and probably waived his rights in that respect, unless this Court should deem the instruction given as plain prejudicial error.

In *Postal Decisions* 1939, with reference to the sufficiency of the evidence as to use of the mails, it is said

"\* \* \* In the absence of a postmarked envelope and of any testimony whatever by any person who saw the letter in or received it from the mails, a charge of mailing can not be sustained on the bare confession of accused that he mailed it." Section 144, page 151, *Postal Decisions*, *supra*.

*U. S. v. Browne*, 7 Cir., 225 F.2d 751, 756;

*Mackett v. U.S.*, 7 Cir., 90 F.2d 462, 464;

*Brady v. U. S.*, 8 Cir., 24 F.2d 399, 403.

The lower Court should have entered a judgment of acquittal on all Counts in the Indictment because of failure of proof.

**The Court Committed Prejudicial Error in Telling the Jury that If the Government Did Not Prove Its Case, He Would Direct a Verdict, Thereby Leaving the Impression that If He Did Not Direct a Verdict, the Defendant Was Guilty.**

#### IV.

The lower Court committed prejudicial error in stating before the jury, after an objection had been made to evidence that if the Government didn't prove its case, he would direct a verdict, because the jury would be led to believe that if he did not direct a verdict, the defendant would be assumed guilty; the following is the objection and the Court's comments:

"Q. What did the person ask?

Mr. Whitney: If the Court please, I object to it on the grounds that no foundation has been laid for it. This is a different situation than if a man has an established phone.

The Court: If they don't prove their case I will direct a verdict.

Mr. Whitney: Thank you.

The Court: So don't interrupt just the minute a question is asked."

The above statement by the Court that if the Government failed to prove its case he would direct a verdict, certainly is prejudicial error of a substantial nature, particularly in view of the fact that he admonished counsel not to interrupt "just the minute a question is asked" (40). In a case where the evidence of the false pretenses, representations and promises are as barren, as from the record this case seems to be, we believe that these remarks made by the Court involving as it did a telephone conversation, would be highly prejudicial. The jury might very well have gone out and said, "the Judge stated that if the Government did not prove its case, he would direct a verdict, and he failed to direct one, so the defendant must be guilty." It is true that defendant did not immediately move for a mistrial, but this in no manner condones the error.

The Courts have reversed cases because the District Judge improperly reprimanded defendant's counsel, *Kraft v. U. S.*, 8 Cir., 238 F.2d 794, 800, 801.

Likewise the Courts have reversed cases for an unfair judicial interpretation of an indictment before the jury, and unfair statements while counsel for the defendant was explaining the case to the jury. *Sunderland v. U. S.*, 8 Cir., 19 F.2d 202, 208-212.

**The Court Erred in Admitting Telephone Toll Bill in Evidence Showing a Call Made in 1953 Where the Indictment Charged the Call to Have Been Made in 1954.**

## V.

The lower Court erred in admitting Government's Exhibit 51 in evidence for the reason that said Exhibit was a telephone toll bill showing calls in August 1953 (334, 335), whereas Count X of the

indictment (9) alleges the gist of the offense to have been committed on or about August 13, 1954.

The admission of Government's Exhibit 51 in evidence unquestionably was an error. The Court realized that the objection was good, because he stated that if it was an information, the date might be changed, but not in an indictment (334, 335). The Court, notwithstanding the objection, allowed the document in evidence, because another Count in the indictment charged that there was a *mailing* on or about the 13th day of August, 1953 (335).

Count X states that the telephone call was in August, 1954; the document sought to be introduced, i.e., the telephone tolls, showed August, 1953. Count IX, which is the mailing of a letter in August, 1953, certainly cannot change the direct allegations of Count X as to date. We believe that substantial error was committed in the admission of this Exhibit.

This particular assignment is typical of other errors in the record, re: admission of evidence.

### CONCLUSION

We respectfully submit first, that the indictment fails to state an offense against the United States because the alleged scheme set up is vitally defective. If, however, the scheme is properly set up, then there is absolutely no proof that the defendant made the false and fraudulent pretenses, representations and promises charged in the indictment, and therefore, the Court below should have entered a judgment of acquittal as to each and every of the ten Counts defendant was convicted on.

The Court committed prejudicial error in its remarks before the jury (40) and in admitting in evidence, Government's Exhibit 51, showing telephone call as being in Au-

gust, 1953, whereas the indictment charged (9) that said call was made in August, 1954.

The evidence was, in our judgment, insufficient to prove even that defendant made the telephone calls, to say nothing of their fraudulent content.

It is respectfully suggested that on account of the failure to prove the alleged false and fraudulent pretenses, representations and promises as laid in the indictment, that this Honorable Court should reverse the case with instructions to the Court below to enter a judgment of acquittal on each and every Count of the indictment upon which the defendant was convicted; in all events the case should be reversed.

Respectfully submitted,

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No. 15391

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IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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BENJAMIN B. HOFFMAN,  
*Appellant,*  
vs  
UNITED STATES OF AMERICA,  
*Appellee.*

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APPELLEE'S REPLY BRIEF

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Appeal from the United States District Court,  
District of Arizona

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**No. 15391**

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IN THE  
**United States**  
**Court of Appeals**  
**For the Ninth Circuit**

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BENJAMIN B. HOFFMAN,  
*Appellant,*  
VS  
UNITED STATES OF AMERICA,  
*Appellee.*

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APPELLEE'S REPLY BRIEF

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Appeal from the United States District Court,  
District of Arizona

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I. Nature of Case

Defendant's<sup>1</sup> statement of the *Nature of Case*, set out on Pages 1 and 2 of Appellant's Opening Brief is correct (A-1 and 2).<sup>2</sup>

II. BASIS of Jurisdiction:

The U. S. District Court had jurisdiction pursuant to Title 18 U.S.C., Section 3231, and this Court has jurisdiction under Title 28 U.S.C., Section 1291.

### III. Statement of the Case:

For the convenience of the Court, Plaintiff<sup>1</sup> has included Schedule No. 1 in the *Appendix*. Schedule No. 1 is a summary showing each Count of the Indictment, the violation charged, the party defrauded, the date of the violation and the foodstuff sent to the Defendant.

### STATEMENT OF FACTS

It is obvious in the first paragraph of (A-5), under subdivision, *The Facts*, that the Defendant has little liking for the Plaintiff's case. "The facts given in the light most favorable to the Government . . . ." (A-5) as presented by the Defendant, would and should bring about a reversal of this case and a fulfillment of Defendant's greatest expectations.

Examining the statement of the Defendant, with a few added words by Plaintiff, will place the facts ".... in a light more favorable to the Government ...." In (A-5) first sentence, first paragraph, Defendant says:

"The facts given in a light more favorable to the Government show that the Defendant ordered merchandise by telephone from various persons and companies named in the 'wire' counts; that he received nearly all of the merchandise so ordered and did not pay for same."

With the addition of a few words, italicized, this statement is, in Plaintiff's opinion of the evidence, much more accurate, to-wit:

The facts given in a light more favorable to the Government show that the Defendant *operating out of phony business offices* ordered merchandise by telephone from various persons and companies named

1. Appellee is designated herein both as "Plaintiff" and "Appellee" and Appellant is designated as "Defendant" and "Appellant."

2. Hereafter the letter "A" followed by a dash and a number or series of numbers enclosed in parentheses will refer to Appellant's opening brief and the page number therein.

*in the "wire" counts, intending at the time of the telephone call not to pay for the merchandise ordered; that he received nearly all of the merchandise so ordered and did not pay for the same; that all orders made by telephone by the Defendant and described in the "wire" counts, were made as the part of a scheme on the part of the Defendant to defraud the various persons and companies named in the "wire" counts, to obtain the ordered merchandise by false pretenses.*

The preceding statement of facts would be the facts most favorable to Plaintiff. The "mail" count facts would be substantially the same as the "wire" count facts, except, that they would recite the "use of the mails for the purpose of executing Defendant's scheme to defraud."<sup>3</sup>

In several recent cases<sup>4</sup> this Court has held that where there are several counts in an indictment or information and identical concurrent sentences were imposed, and the sentence did not exceed the maximum sentence which could have been imposed under each count on which the Defendant was convicted, that the judgment will not be reversed if any one count is free from the error. The U. S. Supreme Court has ruled likewise.<sup>5</sup>

It is Plaintiff's belief that all of the Counts upon which the Jury returned a guilty verdict against the Defendant are substantially proven as alleged in the indictment. In order to conserve time and space, Appellee has selected Count XI to make a detailed statement of fact.

Ted R. Brice, Manager, of the T. L. Brice Company, located in Sherman, Texas, (T-121) received a collect telephone call from Tucson, Arizona, on May 25, 1953

3. U.S. vs. Mercer, (Cal.), 133 Fed. Supp. 288.

4. Cohen vs. United States, (C.C.A. 9, 1953) 201 F. 2d 386.  
Paquet vs. United States, (C.C.A. 9, 1956) 236 F. 2d 203.

5. Pinkerton vs. United States, 328 U.S. 640, 641-642.

(T-122; Plaintiff's Exhibit 14)<sup>6</sup> from the Defendant, who represented himself as Ben B. Hoffman, Wholesale Grocery, Tucson, Arizona.<sup>7</sup>

The Defendant inquired of Mr. Brice whether Brice had pickles for sale, the price of his pickles, and the delivery date of purchases (T-123). During this telephone conversation, the Defendant made several representations and pretenses to Mr. Brice that were false and fraudulent and calculated to obtain Brice Pickles without payment, to-wit: (1) That he was Ben B. Hoffman, Ben B. Hoffman Wholesale Grocery (T-122); (2) That he wanted to purchase pickles (T-123); (3) That the terms of payment were satisfactory, "one percent 10, net eleven" (T-123). Another false pretense was represented by Defendant to Mr. Brice in a later telephone call, prior to shipment by Mr. Brice, when Defendant represented that he was the one purchasing the James A. Dick Grocery Company, Tucson, Arizona (T-124), when such was not the fact (T-198). This representation was made by Defendant upon inquiry by Mr. Brice into the Defendant's credit (T-124) standing.

Mr. Brice, relying upon the representations of the Defendant caused the pickles listed on the invoice and bill of lading (Plaintiff's Exhibits 13 and 15) to be shipped on June 4, 1953 (Plaintiff's Exhibit 13) by his own truck from the Brice Plant at Sherman, Texas (T-123), to Tucson, Arizona (T-125), on open account (T-133). This shipment consisted of 775 cases of assorted Brice Pickles at a cost to the Defendant of \$2,138.75 (T-125; Plaintiff's Exhibits 13 and 15).

6. Hereafter the letter "T" followed by a dash followed by a number or series of numbers enclosed in parentheses will refer to the Transcript of Record and the page number or numbers therein.

7. In the Transcript of Record, pages beginning with 126 through 131 are out of sequence. The true chronological order of testimony and evidence can only be reviewed in the original Transcript of Proceedings, filed herein.



Defendant received this shipment in Tucson, Arizona, on June 6, 1953, and he signed receipt for the goods upon the invoice presented to him by the Brice truck driver (T-123; Plaintiff's Exhibits 13 and 15). This signature of the Defendant upon the invoice (Plaintiff's Exhibit 13) was found to be the same signature, written by the same person, as known identified signature specimens of the Defendant introduced into evidence earlier in the trial (T-80 and 81; Plaintiff's Exhibits 8K, 8L, 8M, 8N, 8P, 8Q, 8S, 8T).

Upon Defendant's direction the merchandise was stored in the warehouse of the Tucson Transfer Co., Tucson, Arizona (Plaintiff's Exhibits 26 and 26A-26D).

Within just five days after the receipt of these goods the Defendant succeeded in selling 690 cases of Assorted Brice Pickles to Rouland Goodman, Goodman's Market, Tucson, Arizona, for \$1,083.75 (T-192 through 196; Plaintiff's Exhibits 26 and 26A-26D). This sale represents a loss of \$759.75 on the invoice price to the Defendant (Plaintiff's Exhibits 13 and 15). Schedule No. 2, Appendix, graphically sets out this loss.

Mr. Goodman testified that he carefully examined the pickles because "the price was kind of below normal" (T-197) and that he determined the merchandise to be first-class (T-197); that he purchased the 690 cases (T-195) of Brice Pickles (T-197) and paid for them by his check No. 2488, dated June 12, 1953 (Plaintiff's Exhibit 26-d). This check has the endorsement of Ben B. Hoffman on it. It was found that this signature was written by the same person, the Defendant, who signed Plaintiff's Exhibit 13.

After delivery of the merchandise to the Defendant, and the Defendant's sale of the goods at a \$759.75

loss, Mr. Brice attempted to collect on the open account. He telephoned the Defendant, prepaid, (T-129; Plaintiff's Exhibit 14) demanding payment as agreed upon (T-123). Brice testified, "... we told him to either send the money from the invoice, or we would turn it over to our attorney for collection, or pick up the merchandise" (T-126). Defendant said that a check would be in the mail that evening (T-126). In a day or so after this call Mr. Brice received a check in the amount of \$400.00 from the Defendant (T-126). After receipt of the check, Brice again attempted to collect the balance due on the invoice price (T-130) by prepaid telephone calls to the Defendant (T-130; Plaintiff's Exhibit 14). In the last phone call, Brice told the Defendant, "... if it was not paid we would come out and pick up the merchandise and issue a credit for merchandise we picked up . . . ." (T-130). " He(Defendant) said they (merchandise) were distributed over a several hundred mile area, and he couldn't pick them up there, and he would mail a check, I think that night, or very shortly, mail another check very shortly, and at that time we gave him so many hours to mail another check in, which did not come in. Q. That check never came in? A. That is right." (T-130). The jury found that this maneuvering by the Defendant constituted "lulling" procedures designed to keep Brice from understanding the true situation regarding his account, his merchandise, and the scheme of the Defendant, to which he had become a victim.

The facts, in addition to the foregoing, showed that Ben B. Hoffman, doing business as Ben B. Hoffman Wholesale Grocery, Tucson, Arizona, as a phoney business front. It was shown that at his place of business, when Mr. Goodman visited it, he had \$150.00 worth of merchandise therein (T-200). Mr. John E. Doyle's, a

retired railroader, testimony clearly shows how the scheme of the Defendant operated (T-200 through T-214). His recital of the Defendant's telephone procedure is corroborated by Henry Leppla (T-137 through 145), Mrs. Darling (T-40 through 42), John L. Glass (T-365) and W. C. Hayward (T-332 through 350). Doyle was an employee of the Defendant, worked for him a week for \$5.00, and lived across the street from the Defendant's business (T-201). He was hired as a janitor and to answer the telephone (T-202). There were no files, books or records in the office (T-202). The only employee was Doyle (T-203). No salesman (T-204), nobody came in. He overheard a whole truckload of pickles ordered (T-206). Doyle's description of this office and its procedures is corroborated by the testimony of Henry Leppla (T-137 through 145), William W. Pritchett (T-93 through 99), Nadine Cram (T-99 through 102), George Renner (T-89 through 92), Lynn Bedford (T-184 through 191).

#### IV. ARGUMENT

In answering Appellant's argument we will discuss the Specifications of Error in the order in which they are presented in Appellant's Brief.

##### SPECIFICATION OF ERROR NO. I (A-10)

*The Indictment does not state facts sufficient to constitute an offense against the United States.*

It has long been settled in federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the ~~defense~~ <sup>OFFENSE</sup> with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act.

*Todorow vs. United States*, (C.C.A. 9th) 173 F. 2d 439, 447

*United States vs. Bickford*, (C.C.A. 9th) 168 F. 2d 26, 27

*Hagner vs. United States*, 285 U.S. 427

In the *Hagner* case, *supra*, at page 433, the Court said, "... it is enough that the necessary facts appear in any form, or by their fair construction can be found within the terms of the indictment."

Plaintiff submits that the Indictment returned against the Defendant (T-3 through 10) stands the acid test of this court's close inspection.

To illustrate the sufficiency of the Indictment, Plaintiff will use Count I (T-3, 4 and 5). There are several points of law that must be kept in mind when examining this Count. (1) Case law applicable to "mail fraud" 18 U.S.C., Section 1341, is also applicable to "wire fraud" violations under 18 U.S.C., Section 1343.<sup>5</sup> (2) The "gist" of the offense of "mail fraud" (wire fraud) is not the scheme to defraud, but it is the use or attempted use of the mails (wire) in the execution of the scheme.

*Kreuter vs. United States*, 218 F. 2d 532, (certiorari denied 349 U.S. 932)

72 C.J.S., *Post Office*, Section 49(b)

*Hartzell vs. United States*, 72 F. 2d 569

(3) The elements of the offense are: (a) Scheme to defraud, and (b) use of the mails (wire).

*Webb vs. United States*, 191 F. 2d 512

72 C.J.S., *Post Office*, Section 49(c)

Count I consists of two paragraphs. The first paragraph sets out the scheme of the Defendant invented by him on or about the 29th day of May, 1953, and in effect sets out the first element of the offense-scheme to defraud. The second paragraph actually sets forth the gist of the offense (interstate wire, T-5), states facts sufficient to inform the Defendant of the offense with which he is charged, and avers facts sufficiently certain to safeguard Defendant from a second prosecution. This constitutes the second element of the offense-use of interstate wire.

Let us examine the allegations of paragraph 2: (a) In the furtherance of the scheme in paragraph 1, Defendant made fraudulent representations and promises as set out in paragraph 1, (b) on November 23, 1954, (c) in the Arizona District, (d) for the purpose of executing the scheme in paragraph 1, (e) did by interstate wire, (f) telephone Long's Date Gardens in Pasadena, California, (g) and place an order for food products, viz., dates, (h) to be delivered to the Acme Distributing Company, Tempe, Arizona.

Can it seriously be contended that the Defendant could not successfully defend himself against an indictment in, say, the Southern District of California, in a few years, if the Grand Jury there would indict him for the violation set out in Count I? Plaintiff believes it cannot be seriously contended.

If there is any question at all in Count I, or the other Counts, it was cured by the Bill of Particulars (T-13, 14, 15 and 16). On T-15, the Bill set out the persons who received the telephone calls from the Defendant, to-wit:

“Long Date Gardens  
2600 East Foothill

Pasadena, California

Item: Dates

Person phoned: Mrs. Lola M. Darling''

Testimony, as to telephone conversations with the Defendant, at the trial was limited, by the Court, to those persons described in the Bill of Particulars.

Plaintiff will now answer each of the subdivisions set out by the Appellant in Specification of Error No. I, to-wit:

(a) *The scheme to defraud, as alleged, is not a continuing scheme.*

*Answer:* Appellant's best argument in his brief on this subject, appears to be that because the Grand Jury of the District of Arizona did not use the Official Mail Fraud Form, Title 18 U.S.C.A., 612, that the Indictment did not allege a continuing scheme to defraud. We agree with the Appellant (A-12) that if this is so, all Counts of the Indictment should have been dismissed, except Count XI.

We have great faith in the Official Forms and use them extensively. One glance at the Indictment will plainly show that, in the main, the Official Form served as the basis for drawing the Indictment. We do not believe, however, that the Official Forms constitute "the minimum requirements" in charging the offense that they were drafted to charge. This Court held in the case of *Ochoa vs. United States*, (C.C.A. 9th) 167 F. 2d 341, 345, that although the statutory crime of Murder in the First Degree required Malice, that the Official Form not charging Malice was not defective because "the form employed can be considered to include all the essential facts constituting the offense . . . and it was prescribed by the Supreme Court, which we must necessarily assume was cognizant of

the requirements of the law.” This was not a “minimum requirement” but an example of the harmony and spirit and intent of 18 U.S.C.A., Rule 7(c).

Appellee contends that plain English dictates that when something is done “for the purpose of executing the aforesaid scheme and artifice” (T-4 and 5, Count I, 2nd paragraph) that said scheme is not completed and that in each and every Count the Indictment alleges a continuing scheme. We know that this contention is within the spirit, intent and hope of Rule 7(c), 18 U.S.C.A.

Appellee has no quarrel with the cases cited by the Appellant on A-12, through A-20, except that they are not applicable in this case. Their holdings have been complied with both in the Indictment and in the Trial of the Case.

*(b) The scheme is not charged with sufficient particularity to enable the Defendant to know the charge against him by direct and positive averments and not inferentially.*

*Answer:* This argument is set out, heretofore, following paragraph IV entitled: *Argument*, subparagraph entitled: *Specification of Error No. I.*

*(c) That said scheme alleged by the Government shows nothing more than transaction on credit.*

*Answer:* This was the same argument used by Counsel in his closing argument to the jury. They did not believe it then and Appellee does not believe it now. Mail Fraud Cases are replete with similar examples of transactions on credit. This was a question of fact and the jury determined that the Defendant never intended to pay for the merchandise he ordered.

The additional complaints of the Appellant, following subparagraph (c) are misleading, as a Bill of Particulars (T-13 through 16) was filed in this action.

## SPECIFICATION OF ERROR NO. II (A-21)

*The verdict on the "wire" counts is unsupported by evidence.*

The Defendant would be in a strong position if his argument: that the Plaintiff must prove each misrepresentation set out in the Indictment beyond a reasonable doubt is taken seriously. This we feel is not, however, the law.

We believe the law is that the Plaintiff is not required to make proof of every allegation of the scheme contained in the Indictment, and that the Plaintiff has succeeded in proof when he has established the scheme substantially as set out in the Indictment.

*Shreve vs. United States*, (C.C.A. 9th) 103 F. 2d 796, Note 30, page 812

*Graham vs. United States*, (C.C.A. 10th) 120 F. 2d 543, 546

*Rude vs. United States*, 74 F. 2d 673, 677

We have substantially proven the false pretenses and misrepresentations of the Defendant and the Transcript of Record bears this out.

There are several false pretenses or false representations, used or made by the Defendant that run to all of the Counts in the Indictment. They are:

- (1) That he was Acme Distributing Company of Tempe and Mesa and Ben B. Hoffman, Ben B. Hoffman Wholesale Grocery. These pretenses were false and fraudulent because these business fronts constituted phoney companies. See the testimony of Bedford (T-184), Cram (T-99), Doyle (T-200), Goodman (T-192), Hirsch (T-85), Leppla (T-137), McRuer (T-74), Pritchett (T-93).



- (2) That he wanted to purchase foodstuffs ordered. This pretense was false because at the time he ordered the goods he intended not to pay for the merchandise.
- (3) That he was a wholesale dealer in foodstuffs. This pretense was false for the same reason as (1) herein.
- (4) That he had the ability to pay for the goods shipped to him. This pretense was false as he had a bad credit rating and no visible assets (T-222, and the testimony of the witnesses set out in (1) herein).
- (5) That he would make payment on the account pursuant to the custom of the trade. This pretense was false because he did not intend to pay for the goods when he ordered them.

The Court in instructing the jury gave an instruction which Plaintiff feels represents the law in this type of "mail-wire fraud" case (T-381). This instruction, hereafter set out in full, was not objected to by the Defendant and represents a clear statement from the case *Roper vs. United States*, 54 F. 2d 845, 847. The instruction goes to every Count in the Indictment, to-wit:

## "COURT'S INSTRUCTIONS TO THE JURY

\* \* \* \*

"You are instructed that the phrase 'false and fraudulent pretenses, representations and promises' as charged in the indictment means untrue and false words and conduct which are calculated to deceive and to induce action which would not be taken if the truth were known by the person (409) deceived.

"If you find beyond a reasonable doubt that the defendant did in fact order the products set forth in the indictment, I instruct you that this constituted a promise and representation that the defendant in-

tended to pay for the products ordered, but for such representation and promise to be considered false you must further find beyond a reasonable doubt that the defendant at the time he ordered the goods had no intention of paying for the products ordered.”

With the above facts in mind, Appellee will now examine each of the Defendant's Arguments, Count by Count, to-wit:

*Count I:* In addition to the false pretenses set out heretofore, the testimony of Mrs. Darling (A-22 and 23) shows clearly that she was “taken in” by a real “con” artist. His technique was good enough that Mrs. Darling lost \$16,725.00 (T-49).

It is Defendant's right to pick testimony most beneficial to his position, but it is misleading. Pages 40 and 41, *Transcript of Record*, show additional conversation between Defendant and Mrs. Darling as follows:

“Q. (by Mr. Eubank): What did this individual say that called you?

A. The party that called, that identified me as Mrs. Long, they asked me if I had any dates to sell, of which I told him I did. And then they told me the amount they would want, and we agreed on a price, just by telephone only.

Q. Do you recall the amount that they wanted, approximately?

A. I think the first order he wanted 600 boxes of three and five-pound sizes.

Q. And what was the price you quoted him?

A. I quoted 45 cents a pound f.o.b. Pasadena.”

The entire testimony of Mrs. Darling (Long) is the basis for the jury's verdict of guilty on Counts I and III of the Indictment, not merely the part quoted by the Appellant.

*Count II:* This Count is substantiated by the very testimony the Defendant has chosen to illustrate that

it is not sufficient. It contains false representations and false pretenses that the jury found were false, among which are the following:

(a) "This is the Acme Distributing Co., Ben Hoffman, speaking."

(b) "Johnnie, you must remember me. I met you about a year ago down in the market."

(c) "Some of *my* boys this time of year have been getting calls for California Dates . . ."

This testimony coupled with the general false pretenses set out heretofore, creates substantial evidence as required for conviction.

*Count IV:* By the very terms of the testimony of Mr. Ehlinger (A-27), cited by the Appellant, you must look to the exhibits in evidence and further testimony in the *Transcript of Record*, to find the terms agreed upon, representations and pretenses made, for this sale was made through a series of telephone calls, letters, and Western Union telegrams. In this Count, as in the others, Defendant held himself out as a respectable wholesale grocery, Acme Distributing Company, Tempe, Arizona, interested in sea products (A-26 and 27). See the testimony between the Defendant and Mr. Ehlinger that resulted in shipments (T-267 through 283 and Plaintiff's Exhibits 39, 40 and 41, 41A through 41D).

*Counts V, VII, X:* In these Counts like the others, heretofore discussed, the Defendant has failed to carry his burden of proving the insufficiency of the evidence. He has lifted out of context a segment of the testimony in evidence and says, in effect, "see this part of the testimony does not contain all of the false pretenses and misrepresentations set out in the Indictment." Plaintiff submits that the burden should be upon the Appellant to clearly show insufficiency of the evidence.

*Harris vs. United States*, (C.C.A. 9th) 48 F. 2d 771, 777

a. In Count V (A-29) Defendant agreed to pay on arrival, but he never paid.

b. In Count VII (A-29) Defendant and Kelly established the terms of sale by conversation over interstate wire and by letters exchanged through the U. S. Mails. The false pretenses under this Count are those set out heretofore.

c. In Count X, using just the small parts of testimony given in evidence by Mr. Hayward, and used by Appellant in his brief (A-31 and 32), several false pretenses and misrepresentations appear in even that short space, to-wit:

(1) Hoffman represented he was a wholesaler entitled to 5% price reduction.

(2) Terms were 1%, 10 days, which Defendant did not intend to pay.

(3) "He said he discounted all of his bills, and I needn't worry about the payment of them."

Additional false pretenses and misrepresentations on the part of the Defendant appear in the full transcript (T-332 through 350). On page 336, *Transcript of Record*, appears the following misrepresentation of credit:

"Q. (by Mr. Eubank): Now, in regard to that first telephone call, what did Mr. Hoffman tell you about his business, or did you inquire about his business in Tucson?"

A. Yes, I inquired about his business in order to give him the correct price. He said he was the largest wholesale dealer in Tucson."

d. Count XI is exhaustively covered in the *Statement of Facts*, herein.

*Conclusion:* (a) The burden of showing insufficiency of the evidence to justify the verdict in this action is upon the Appellant.

*Harris vs. United States*, (C.C.A. 9th) 48 F. 2d 771, 777

(b) There is authority that the Ninth Circuit Court of Appeals will indulge all reasonable presumptions in support of the trial court's rulings and draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, the Court will consider the evidence most favorable to the Appellee.

*Henderson vs. United States*, (C.C.A. 9th) 143 F. 2d 681, 682

*Pasadena Research Laboratories, et al. vs. United States*, (C.C.A. 9th) 169 F. 2d 375, 380

(c) When Appellant contends evidence is insufficient to support the verdict, the contention calls for an examination of the basic facts as the jury could have found them from the evidence if every conflict in testimony had been resolved in favor of the Appellee.

*Todorow vs. United States*, (C.C.A. 9th) 173 F. 2d 439, 442

It is obvious from the aforementioned authorities that the Appellant has failed to carry the burden of demonstrating insufficiency of the evidence. One glance at the Statement of Facts (A-5) illustrates just how lightly this burden is carried. A reading of the evidence in any count proven in this case, would result in more "basic facts" than the Appellant has seen fit to point out to the Court.

There is sufficient evidence to sustain all of the "wire" Counts of the Indictment.

SPECIFICATION OF ERROR NO. III (A-36)

*“The Verdict on the Mail Counts is unsupported by evidence.”*

Appellee will reply to the Appellant's claims of error by answering each subdivision claim.

- A. “(a) The evidence was insufficient to submit to the jury the question beyond a reasonable doubt as to whether said mailings were made, or if made, were in furtherance of the scheme to defraud where the evidence clearly shows that the Government failed to prove the scheme as alleged, or at all, and therefore, such use of the mails could not be in furtherance of a scheme to defraud.”

*Answer:* In support of Count VIII, Appellee placed in evidence Plaintiff's Exhibits 29 and 30. Those exhibits represent two letters, 29 from Kelley to Hoffman, and 30 from Hoffman to Kelly. The stationery, Exhibit 30, was compared by the jury with Plaintiff's Exhibit 26-D (T-196) and found to be the same. The signature of the Defendant on Exhibit 30 was compared with his identified signature, Plaintiff's Exhibits 8-N, 8-O, etc. set out in *Transcript Record*, pages 80 and 81, and the jury found they were written by the same person. Government's Exhibit 30 is addressed to “Post Office Box 174.” Kelley testified to the question of whether or not he opened the letter himself. “A. Well, I rather think so. If I am away, the mail is opened by my bookkeeper. If I am there, I open all the mail, and to the best of knowledge I opened that letter. Q. But you are not sure? A. Well, I am not definitely sure, no.” The jury found that he opened the letter.

In support of Count IX, the fact of receipt of the letter, Plaintiff's Exhibit 52, is proven by the stationery and signature, as set out above in the discussion on Count VIII, and the telephone conversations between Hayward and the Defendant, both before and after the

letter was received by Haywood. (T-336 through 343). Plaintiff's Exhibit 51 establishes the dates of the phone calls to Hayward from the Defendant and the telephone calls subsequent to receipt of the letter from the Defendant.

The testimony of Hayward (T-338) requested the Defendant to confirm the order (T-336 and T-337) in writing. The date of the first telephone call collect from Tucson, August 10, (Plaintiff's Exhibit 51) the date of the letter, the testimony of Hayward (T-340 and 341) satisfied the jury, together with the other facts that the U. S. Mails had been used.

In support of Count III, we have in evidence the testimony of Mrs. Darling (Long) (T-57) "... I told them if they didn't send the money, I wouldn't make another shipment, and they said it would be in the mail." She testified she received the check (Plaintiff's Exhibit 5) enclosed in Plaintiff's Exhibit 4 (envelope). The jury found that the envelope was sent by Hoffman to Mrs. Darling and this is confirmed by the return address on Plaintiff's Exhibit 4. On the face of the check (Plaintiff's Exhibit 5) the name Acme Distributing Company appears.

The strong argument of Appellant relating to the "lulling" effect of this letter results from the cross-examination of Mrs. Darling (Long) *Transcript of Record*, 67 through 71. Her testimony was that she did not ship the final shipment until she received the \$500.00 cashier's check from the Defendant. Defendant's attorney showed that the check was dated on December 12, 1954 and the air mail envelope post-marked December 13, 1954. Defendant's attorney then asked her if she was not mistaken, having shipped the order before receiving the check, she said that she was

sure she did not ship before receiving the check. The jury believed her.

Consequently, in this Count the mailing is conclusively proven beyond any doubt.

B. “(b) because if there was a scheme, it was consummated prior to the time the letters were mailed.”

*Answer:* There is no evidence to support this contention of the Appellant.

Counts VIII and IX could not have been consummated as the receipt of the letters, therein, was essential to negotiations and the subsequent shipment of merchandise to the Defendant. See the discussion, subparagraph A, Specification of Error No. 3, heretofore set out.

Count III is fully discussed in subparagraph A, Specification of Error No. 3, heretofore set out.

The jury found from all the facts in evidence that a scheme did exist. The Appellant has failed to show otherwise.

C. “(c) because the entire evidence shows that the transactions were credit transactions and the placing of orders for goods in and of itself does not constitute the promises and representations charged in each Count of the Indictment.”

*Answer:* When this theory was presented to the Court for Instructions, the Appellant made no objection (T-381). In fact, the Appellant checked the case to see if it held the law as the Appellee represented it. Upon satisfying himself of this fact, he did not object to the instruction. The case is *Roper vs. United States*, 54 F 2d 845, 847.

Upon reading the *Transcript of Record*, and the case, *State of Arizona vs. Ben Hoffman*, 78 Arizona 319, you can easily ascertain the great wisdom of the rule



of law in the *Roper* case. All the evidence of all these witnesses leads to only one conclusion, and that is that the Defendant, in every waking moment, was himself a false pretense and a misrepresentation of fact.

These were not credit transactions. The Defendant intended to obtain goods without the necessity of paying for them. This lowers business costs and reduces overhead expenses.

D. “(d) because the matter mailed did not contain any representation whatsoever.”

*Answer:* In answer to this point, I will quote the Appellant on page 30 of his Opening Brief, where he says:

“We realize that the letter may be ever so innocent, but if it is sent in furtherance of a scheme to defraud, an offense is committed.”

This is a correct statement of the law, and the jury found that the letters sent in Counts III, VIII and IX were in furtherance of the scheme to defraud. The letters are discussed more fully under subdivisions A and B, Specification of Error No. 3, heretofore set out.

#### SPECIFICATION OF ERROR NO. IV (A-40)

*“The Court committed prejudicial error in telling the jury that if the Government did not prove its case, he would direct a verdict, thereby leaving the impression that if he did not direct a verdict, the Defendant was Guilty.”*

This Specification of Error illustrates the weakness of Appellant’s appeal. To rely on this statement by Judge Ling as a point of error is ludicrous.

The statement, as Mr. Whitney knows, was directed at the Appellee, and means what it says, that if the

prosecution fails in its proof, the Court will direct a verdict in favor of Defendant.

Any prosecutor that has tried a case before Judge Ling knows full well the meaning of his statement. Many has been the case, with a half proven element that has been terminated by a directed verdict when the Government rested its case.

This was the meaning of Judge Ling's remarks taken in fair construction. The words were used in place of a denial of Mr. Whitney's objection and in the exercise of the Court's discretion as to when a proper foundation for admission of evidence was laid.

If any prejudice did result to the Defendant from this statement at page 40, *Transcript of Record*, it most certainly would not have affected the next day's proceedings and most certainly would not have affected the entire *Transcript of Record* thereafter.

#### SPECIFICATION OF ERROR NO. V (A-44)

*"The Court erred in admitting telephone toll bills in evidence showing a call made in 1953 where the Indictment charged the call to have been made in 1954.*

The Appellant states correct facts in his brief (A-42). It was our contention, and the Judge assented to it, that because the Defendant was charged in two counts, IX and X, with a scheme to defraud Hayward (T-334, 335), and was charged with an incorrect date (by one full year) in Count X, but was charged with the correct date in Count IX, that he was sufficiently informed of the offense to prepare his defense and could, after conviction, successfully defend himself on a similar charge under an Indictment alleging the correct date in Count X. It stands to reason, if he prepared his

defense under Count IX, he would have had to prepare his defense under Count X. Of course, he had no defense.

## CONCLUSION

Appellee respectfully submits that the Appellant has failed to carry the burden of persuasion in his arguments set out in the several Specifications of Error heretofore discussed. For this reason the Appellee prays that the Honorable Court dismiss the appeal and affirm the Judgment entered by the U. S. District Court, District of Arizona.

Respectfully Submitted,

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*for the District of Arizona*

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*Attorneys for Appellee*

## Appendix

### SCHEDULE NO. 1

Transcript	Count	*Crime	Against Whom	Date	Food Stuff
T-3	I	A	Long's Date Gardens	11/23/54	Dates
T-5	II	A	C. A. Glass Co.	10/11/54	Dates
T-5	III	B	Long's Date Gardens	12/13/54	Dates
T-6	IV	A	Grant-Whitman Co.	6/14/54	Salmon
T-6	V	A	Shurtz Produce Co.	5/24/54	Poultry
T-7	VI	DISMISSED		DISMISSED	
T-7	VII	A	R. O. Kelly Co.	8/31/53	Peas
T-8	VIII	B	R. O. Kelly Co.	8/24/53	Peas
T-9	IX	B	Hayward's Special	8/13/53	Jam
T-9	X	A	Hayward's Special	8/13/53	Jam
T-10	XI	A	T. L. Brice Co.	5/29/53	Pickles

\* Letter A refers to 18 U.S.C., Section 1343 (wire fraud).  
 Letter B refers to 18 U.S.C., Section 1341 (mail fraud).  
 This would constitute the "gist" of the offense.

### SCHEDULE NO. 2

#### ANALYSIS OF SALE OF BRICE PICKLES TO GOODMAN'S MARKETS

Description	A. Invoice price	B. Sales price	No. Cases	Loss
Brice Dill Pickles 12/32 pack	\$2.80	\$2.00	245	\$196.00
Brice Kosher Dill Pickles 12/16 pack	\$2.25	\$1.25	295	\$295.00
Brice Sweet Pickles 24/8 pack	\$4.20	\$1.50	50	\$135.00
Brice Sweet Pickles 12/16 pack	\$3.10	\$1.50	25	40.00
Brice Sour Pickles 24/8 pack	\$3.20	\$1.50	25	42.50
Brice Sour Pickles 12/16 pack	\$2.25	\$1.50	25	18.75
Brice Sour Pickles 12/32 pack	\$2.80	\$1.50	25	32.50
			690	\$759.75

A: See Plaintiff's Exhibits 13 and 15.

B: See Plaintiff's Exhibits 26, 26A, 26B, 26C, 26D.

The above tabulation accounts for 690 cases of the 775 case order from the Brice Pickle Company, and reflects sale thereof for \$759.75 less than the invoice price.

No. 15,391

In the

United States Court of Appeals

*For the Ninth Circuit*

---

BENJAMIN B. HOFFMAN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**Appellant's Reply Brief**

Appeal from the United States District Court  
District of Arizona

---

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FILED

JUN 4 1957

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No. 15391

In the

# United States Court of Appeals

*For the Ninth Circuit*

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BENJAMIN B. HOFFMAN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

## **Appellant's Reply Brief**

Appeal from the United States District Court  
District of Arizona

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We have examined Appellee's brief and on account of the time element and the lack of necessity of answering some of the argument put forth by Appellee, we are going to touch only on Appellee's argument in opposition to Appellant's Specification of Errors numbered 2 and 3, and Specification of Error Number 4.

On the sufficiency of the Indictment we will say only that the Appellee is mistaken when he says (page 9 Appellee's brief) that the Indictment is cured by a Bill of Particulars. A Bill of Particulars should be disregarded in passing on the sufficiency of an Indictment (*United States v. Comyns, et al*, 248 U.S. 349, 39 S.Ct. 98 at 99).

## ANSWER TO APPELLEE'S ARGUMENT RE SPECIFICATION OF ERRORS NUMBERED 2 AND 3

(Pages 21-40 inclusive Appellant's Opening Brief;  
Pages 12-21 inclusive Appellee's Brief)

In connection with the above numbered Specification of Errors, we are satisfied with the presentation made in our opening brief, but in view of the theory of the Appellee that "we have substantially proven the false pretenses and representations of the defendants and the Transcript of Record bears this out", we thought it might be well to reply to this contention. We know that it is not necessary to prove each, every and all of the false pretenses and representations charged in the Indictment, but certainly it is necessary that enough of them be proved so that it can be said that the scheme is substantially proven as laid. (*Rude v. United States, infra*). As was said in *Shaddy v. United States* (8 Cir.) 30 F.2d 340, which was a case in which the defendant's admissions bore closely on a concession of guilt:

" \* \* \* A purchase of goods with the intention not to pay for them would be a fraudulent scheme. (Citing cases). But in this case, it was not even material whether the goods were so purchased; the essential intent being to obtain them on false representations. The indictment charged a different scheme and complete offense under the terms of the statute. (Citing cases).

\* \* \* The main question for the jury was whether this defendant made the alleged representations with a fraudulent intent in fact. The Government had the burden of proof. But by the language of the court the necessary intent was attributable to him from the result of his acts as a presumption of law, which, assuming it to be disputable, cast upon him the burden of disproving such intent. \* \* \*

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1. Figures in parentheses refer to pages in printed Transcript of Record.

In the case now before this Honorable Court for decision, it is to be noted that the scheme itself was the obtaining of money and property "by means of false and fraudulent pretenses, representations and promises" (3, 4).<sup>1</sup> We are sure that the allegations with reference to false and fraudulent pretenses, representations and promises cannot be considered a surplusage, because the alleged false and fraudulent pretenses, representations and promises by the allegations of the Indictment in and of themselves constitute the scheme to defraud. We earnestly insist that, assuming the Indictment is valid, the Government has failed to prove its case as to each and every Count of the Indictment, whether it be Counts under the wire fraud or the mail fraud statute.

We are not dealing here with constructive fraud. We have a charge of actual or active fraud, alleged to have been perpetrated by the defendant on the persons named, not in the scheme, but named only in the *gist of the offenses charged* after the scheme is alleged, and incorporated by reference, in each and every Count of the Indictment upon which defendant was convicted. As stated in *Epstein v. United States* (6 Cir.) 174 F.2d 754, 763:

"\* \* \* A defendant in a criminal case is entitled to know what he is charged with; *and he is entitled to be tried on the charges brought against him.* (Citing cases). (Emphasis supplied.)

The charges of making false and fraudulent pretenses, representations and promises as laid in the Indictment were not substantially proven, in fact, we take the liberty of saying such charges were not proven at all.

*McLendon v. United States* (6 Cir.), 2 F.2d 660;  
*Weber v. United States* (10 Cir.), 80 F.2d 687, 691,  
 692;

*Rude v. United States* (10 Cir.), 74 F.2d 673, 677;  
*Mitchell, et al v. United States*, (10 Cir), 118 F.2d  
 653, 655.

In the *Epstein* case, *supra*, it is said (174 F.2d at page 766):

“In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud. \* \* \*.”  
 “Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases. That, however, is no qualification of the rule that to sustain a charge of using the mails to defraud, there must be proof of an actual fraud, rather than a constructive fraud; and the fact that the crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means, for instance, that a showing of loss to the victim is not necessary to conviction for mail fraud; it does not imply that constructive fraud, or anything less than actual fraud, can sustain the charge of using the mails to defraud.”

When the pretenses or representations or promises which execute the deception are fraudulent and false, they become the scheme or artifice which the statute denounces. *United States v. New South Farm and Home Company et al*, 241 U.S. 64, 36 S.Ct. 505, 508.

In *Rude v. United States*, *supra*, the Court said (74 F.2d at 677):

“It is not necessary to prove all the false representations alleged in an indictment based on Section 215, *supra*, but it is necessary to prove those essential to lay a sufficient foundation for a finding by a jury that

a scheme in substance was devised. (Citing cases). Many of the representations were proved to be false, but the evidence was insufficient to lay a foundation for the jury to find defendants devised a scheme \* \* \*."

The Appellee, "in order to conserve time and space, \* \* \* has selected Count XI to make a detailed statement of fact." (See pages 3 and 4 of Appellee's Brief.) There is nothing in the testimony of Mr. Brice in support of Count XI<sup>2</sup> that would indicate that a substantial part of, or any, false and fraudulent pretenses, representations and promises charged in the Indictment were made to Mr. Brice by the defendant. We note particularly on page 4 of Appellee's Brief that the defendant represented to Brice "in a later telephone call, prior to shipment by Mr. Brice, when defendant represented that he was the one purchasing the James A. Dick Grocery Company, Tucson, Arizona, when such was not the fact." This event is not even charged in the Indictment. As is pointed out in *Mitchell, et al v. United States, supra*, where a particular event is not charged in an indictment it cannot be used as a basis for conviction. 118 F.2d at page 655).

The Appellee, in its brief on page 6 states:

"The jury found that this maneuvering by the defendant constituted 'lulling' procedures designed to keep Brice from understanding the true situation regarding his account, his merchandise, and the scheme of the defendant to which he had become a victim."

Brice, in his testimony, stated definitely that the \$400.00 payment he received made him come out about even on the deal, *and that there was no other merchandise ordered after that payment and none shipped* (133, 134). This was not a "lulling" transaction, as the scheme, if any there was, was

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2. Apparently was selected by the United States Attorney as being the best Count in the Indictment.

fully consummated as to Brice when the defendant received the pickles (118 F.2d at page 655).

We sincerely insist that when specific representations, pretenses and promises are charged that they must be proven substantially as laid. The James A. Dick Grocery Company ownership matter is not even charged in the Indictment, and can in no way aid the proof as to any Count in the Indictment, including Count XI, which is the only Count in which the use of the interstate wire coincides with the date of the scheme. However, the proof, with reference to the date of the use of the interstate wire, does not in any way coincide with the date laid in Count XI (Appellant's Opening Brief pages 32 to 36).

The "lulling" charged in the Indictment is that the defendant made token payments to induce the sellers thereof to further rely on the false representations and promises previously made (4). The James A. Dick Grocery Company matter not being charged in the Indictment, has nothing to do with making the token payment, and the token payment was stated by Mr. Brice not to have "lulled" him into anything (133, 134).

Whatever may be said with reference to the sufficiency of the Indictment to state an offense against the United States or the other points raised in Appellant's Opening Brief, which, because of shortness of time, will not be further commented upon extensively, we feel definitely sure that the evidence is wholly insufficient to support the scheme, i.e., the alleged false and fraudulent pretenses, representations and promises alleged in Count I, and by reference incorporated in each and every other Count in the Indictment.

This case apparently was tried by the Appellee on the theory that if the defendant ordered the products set forth

in the Indictment, that that constituted a promise and representation that the defendant intended to pay for the products ordered. We are not complaining at this late date with reference to the court's instruction on this point; what we do complain of is the fact that whatever the instructions were, the evidence is wholly insufficient to sustain the verdicts. The instruction set forth beginning at the bottom of page 13 of Appellee's brief (380), and, indeed, the Appellee's own theory is that you must infer (1) that if the defendant ordered the products set forth in the Indictment, that this constituted a promise that defendant intended to pay for same, and (2) another inference based on that inference that the defendant feloniously had no intention of paying for the products ordered. You, of course, cannot build an inference on an inference. Under the evidence, in order to sustain the verdicts, this Court would have to base presumption on presumption, or, in other words, inference on inference.

On pages 12 and 13 of Appellee's Brief, Appellee set forth a list of five so-called "false pretenses or false representations", which it says runs through all Counts of the Indictment. These are not backed up by the record, and if they were so backed up, they do not constitute the false and fraudulent pretenses, representations and promises set forth in the Indictment (4). A casual reading of these alleged false pretenses or false representations will show that they are not either charged in the Indictment, or if charged, there is no evidence to support them. The writer cannot put his finger on any testimony to support the claim that Hoffman said he would make payment on account pursuant to the custom of the trade; he does recall that one of the witnesses testified as to what the custom of the trade was, but not that the defendant discussed any such matter.

We again respectfully submit that the Government has substantially failed to prove the scheme; i.e., false and fraudulent pretenses, representations and promises attempted to be alleged in the Indictment.

We fully realize that this Court will not weigh the evidence, and that if there is any substantial evidence to support any Count in the Indictment, that it will affirm, but we again earnestly insist that for the reasons stated, no County in the Indictment has been proven by substantial evidence.

As stated in the cases, a defendant in a criminal case is entitled to be tried on the charges brought against him, and when the pretenses or representations or promises which execute the deception are fraudulent and false, they become the scheme or artifice which the statute denounces. In this case, such constitutes the scheme. There never has been any claim by us that the defendant did not receive the products ordered, except in one instance where the Appellee showed that a carload of peas was stopped in transit. The fact that the defendant received the goods and did not fully pay for same does not prove that defendant made the false and fraudulent pretenses, representations and promises charged in the Indictment.

In passing, it might be well to call this Honorable Court's attention to the testimony of one John E. Doyle called by Appellee in support of its case. Doyle's testimony is briefly referred to on pages 6 and 12 of Appellee's Brief. It also appears in the printed Transcript of Record on pages 200 to 214 inclusive. Doyle's testimony as a whole is a sample of some of the evidence adduced by Appellee and upon which the defendant was convicted.

Doyle testified that he overheard certain telephone conversations by the defendant with others. He does not name



any of the persons called, and in not one of the conversations is it shown that the defendant made any of the representations, pretenses or promises charged in the Indictment. To say Doyle was mistaken in what he did testify to would be mildly putting it. He testified in substance as follows:

“My name is John E. Doyle and I presently am living at 3525 E. Belleview, Tucson, Arizona. I recognize the name of Ben B. Hoffman and Benjamin B. Hoffman Wholesale Grocers as a broker (200). I see Mr. Hoffman in this court room. He is that baldheaded fellow right back of you, wearing a brown coat. I worked for Mr. Hoffman for a week at between 1602 and 1606 S. 4th Ave., Tucson. At that time I lived right across the street from that address, and lived there for about 3 years. Of my own knowledge Hoffman operated there close to a year (201). The date of the business operated across from me was around in June somewhere in the year 1954. I am sure it was 1954 when I worked for Ben about a week. My working hours were from 8:00 in the morning to 4:00 in the afternoon. During the time I worked for Mr. Hoffman he was at the office in the morning—went home for lunch—came right back and was there most of the day. I observed his business operation (202). He had no files nor books of record in the office, and his only employees were me and him, and his wife came in once in a while (203).

Q. What was the character of Mr. Hoffman's business? What did he do to get business?

A. Well, he would come in in the morning with a list his wife give him. She come down and handed him the list, and he would call up these, the long distance operator, and he would give them a list of people that he wanted to call, give him four, five, six or seven of them. And then she would put in the calls, and they called him, and he would order the stuff, whatever he had on the list.

Q. Now, on these particular calls, were those pre-paid (201) calls, or were they collect calls?

A. The other party paid for them.

Q. In other words, it was a collect call?

A. No, it was not collect.

Mr. Whitney: Your Honor, I object. May we ask a question on voir dire?

The Court: You can cross-examine.

Q. (By Mr. Eubank): Now, could you approximate the number of these calls you overheard while you were in the office?

A. Yes, I got a list here. Is it all right to look?

Q. Not right at the moment. I am asking for an approximate number, if you can give one.

A. I don't know how many he had. I got it right down here, sir. That is some of his paper there, too.

Q. On these collect calls they made, were they quite numerous in a day's time?

A. Yes.

Q. Now, you say that you overheard collect calls. Do you recall the character of the conversation?

A. Well, I will just tell you how he used to say it, Mike, and I won't give you the names, and them, because I can't remember the names.

He called and said, 'Hello, is this Mr. Jones?' 'Yes.' 'How are you, this is Ben Hoffman, the broker, in (202) Tucson, Arizona, South 4th Avenue.'

'How is business?' That is the way he started out.

Then he would ask them what the article, the price it was, whatever he wanted, and asked him the size of the cans and all that, then he wanted to know if he could get a truckload, and he would want the truckload. And he said, 'Don't forget to put some samples in for the boys.'

Q. Now, were there any salesmen hired by Mr. Hoffman while you were there?

A. No.

Q. Did you see any salesmen come into the office?

A. No. Nobody come in.

Q. Now, on these phone calls that you say you wrote down a memorandum on.

Mr. Whitney: Did he say he wrote a memorandum, on it?

Mr. Eubank: Yes.

Q. (By Mr. Eubank): Do you have that memorandum with you?

A. Yes.

Q. Can you of your own, of your own independent recollection recall those calls, or do you have to refer to that?

A. I got to refer to this here. That is what I wrote right in his office there, and I kept it. That is the same paper I kept.

Q. That is, referring to this, you can testify as to (203) what his calls were?

A. Sure. Sure. I ain't going to lie against the man. I'm telling the truth.

Mr. Eubank: I ask that this be marked as plaintiff's Exhibit 28 for identification.

The Clerk: Government's Exhibit 28 for identification.

Q. (By Mr. Eubank): I show you Government's Exhibit 28 for identification, and ask you if this is the list you were describing?

A. Yes.

Q. And do you relate this list with any particular day? Any day of your employment?

A. Every day, yes, added to it.

Q. Does this list include all the calls, or just a few calls you overheard?

A. This is the main calls that I remembered.

Mr. Whitney: Your Honor, I ask that this be admitted in evidence not for the purpose of refreshing his recollection, (204) but as the evidence he would give.

The Court: He can use that to refresh his recollection.

Mr. Whitney: For what purpose?

Mr. Eubank: For refreshing his memory.

Mr. Whitney: If he is refreshing memory, then you don't put it in. It is either recorded recollection, or nothing else.

Q. (By Mr. Eubank): Using that list, can you then testify of your own recollection?

A. Yes.

Q. Can you tell us the nature of the telephone calls that were made that you listed there, by Ben Hoffman?

A. *He ordered pickles.*

A. A whole truckload of pickles." (Emphasis supplied.)

At this point we call the Court's attention that one of the items ordered by Hoffman, according to Doyle, was pickles and that the year was 1954, whereas the only pickle deal we have any evidence of is in May, 1953. (See testimony of Brice, printed Transcript of Record, page 124.)

Continuing, Doyle testified that beside ordering pickles he ordered canned peaches, brooms, peas and rice.

There does not happen to be any testimony with reference to rice, peaches or brooms, and the pea deal with R. O. Kelley Company happened in August, 1953. (See testimony of R. O. Kelley printed Transcript of Record page 219.)

Doyle further testified that while he was working for the defendant's establishment, the shipments were not received at the establishment, but were sent down to a Tucson warehouse; that there was a storage facility in conjunction with the office where samples were kept (208).

On cross-examination, Doyle testified that he worked six days for Hoffman (209) and that the list he took down in 1954 and had in his possession was kept by him all of the time (210). He testified that the articles in the list were not

put down on the same day, and some of them were written with a fountain pen and some with pencil, that it was all done in the month of June, 1954 at the time he worked for defendant (211).

“Q. (By Mr. La Prade): Mr. Doyle, do you have any record of the exact day that these phone calls were made you have testified about?

A. No. When I first went to work for him that morning, he started in on that telephone, and he never let up until four o'clock.

Q. When was it you made these notations, right after he made the phone calls, or while he was making them?

A. While he was making the phone calls, I would go back and write it down.

Q. Where? Right in back of the office?

A. Yes, right in back of the office.

Q. Did you listen in on his conversations?

A. Yes.

Q. Could you tell who he was talking to?

A. Well, I didn't put them down, but them were the people he called, that represents that product there.

Q. How does it happen you wrote down these different items of pickles, peaches, rice, percolators, suitcases, and so forth, without writing down where he was talking to? Was there any reason why you put down the items, rather than where he was talking to?

A. Some of them I remember where he called. I remember where it was, like that percolator was Los Angeles Coffee Urn, was the name of the company (212).

Q. Mr. Doyle, do you make it a habit to write down portions of your employers' conversations when you are listening to conversations?

A. Sometimes I do it. Conductors, and so forth, when I am on the road, keep a book. If you are going to be a good railroad man you got to do it.

Q. *Couldn't this possibly be a grocery list of your own, Mr. Doyle?*

A. *Not mine. Maybe the wife's but not mine. I ain't got no grocery list.*

Q. Are you positive about all of your testimony, Mr. Doyle? A. What?

Q. Are you positive about all of the testimony you have given? A. On them there?

Q. There is no question about when it was?

A. No question about it at all.

Mr. LaPrade: That is all.

The Witness: I ain't lying. You think I', a liar?

Mr. Eubank: No further questions." (Emphasis supplied.)

Doyle's testimony we believe to be innocuous in view of the charges made against defendant. It is in about the same category as the testimony of one Brandt given in *Greenbaum v. United States*, 80 F.2d 113, 123 wherein it was said in effect that Brandt's testimony was much shaken in other regards, and that the court cannot hold that a jury would convict on his evidence.

#### RE SPECIFICATION OF ERROR NO. 4

(Pages 40 and 41 of Appellee's Opening Brief)

The Appellee says that to rely on the statement by the Court that "if they don't prove their case, I will direct the verdict" as a point of error is ludicrous. Says the Appellee in its brief:

*"The statement, as Mr. Whitney knows, was directed at the Appellee, and means what it says, that if the prosecution fails in its proof, the Court will direct a verdict in favor of Defendant.*

*Any prosecutor that has tried a case before Judge Ling knows full well the meaning of his statement. Many has been the case, with a half proven element that has been terminated by a directed verdict when the Government rested its case. \* \* \**

If any prejudice did result to the Defendant from this statement at page 40, *Transcript of Record*, it most certainly would not have affected the next day's proceedings and most certainly would not have affected the entire *Transcript of Record* thereafter." (Emphasis supplied.)

The writer feels confident that under the Government's own statement in this regard, that Specification of Error No. 4 is not only meritorious, but demonstrates that the jury may well have thought, in the posture of this case, that if the Court did not direct a verdict, the defendant must be guilty on all the Counts, at least that was the jury's verdict. The Government fails to cite one single authority that holds that such a statement by the court in the trial of a case is not an error of a prejudicial nature.

### CONCLUSION

By this reply brief we are not in any way waiving other errors specified in our opening brief. We are simply attempting to buttress our argument made in the opening brief on the sufficiency of the evidence to sustain the verdicts, and on the Court's improper remark in overruling an objection to evidence made by defendant's counsel.

We again respectfully submit that if it should be held that the indictment in this case is valid, that this Honorable Court reverse with instructions to the Court below to acquit the defendant on each and every Count of the Indictment upon which he was convicted; that in all events this case should be reversed on account of other specified errors.

Respectfully submitted,

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No. 15393.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

DAVID DIAMOND, etc., and FREEDA DIAMOND, etc.,

*Appellees.*

---

## APPELLANT'S OPENING BRIEF.

---

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No. 15393.  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

DAVID DIAMOND, etc., and FREEDA DIAMOND, etc.,

*Appellees.*

---

**APPELLANT'S OPENING BRIEF.**

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**Jurisdiction.**

Appellant, plaintiff in the court below, brought actions in the District Court against each of the appellees, seeking to set aside the orders admitting them to citizenship and to cancel their certificates of naturalization [R. 3-19].<sup>1</sup> After trial was completed and the causes taken under submission [R. 421], the Trial Court dismissed the actions against appellees [R. 39] for lack of jurisdiction [R. 37]; since no "affidavit showing good cause" was filed with or prior to the institution of these actions" [R. 36]. It is the position of appellant that the court below erred in dismissing these actions, and that the District Court had jurisdiction to decide the actions against appellees on their merits.

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<sup>1</sup>"R." refers to printed Transcript of Record.

Since the order of the District Court [R. 39] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C., Section 1291.

### Statement of the Case.

On November 1, 1954, appellant filed complaints in the District Court against each of the appellees, seeking to set aside the orders admitting them to citizenship and to cancel their certificates of naturalization [R. 3-19]. Affidavits showing good cause were not filed with the complaints; however, such affidavits were in possession of the United States Attorney at the time the actions were instituted [Exs. 1 and 16; R. 124-125].

On March 1, 1955 and March 25, 1955, appellees David Diamond and Freeda Diamond moved respectively to dismiss appellant's actions on the ground, *inter alia*, that the Court did not have jurisdiction over the actions in that the complaints were not supported by affidavits showing good cause [R. 20, 22]. The District Court denied the motions of appellees David Diamond and Freeda Diamond on March 21, 1955 and May 31, 1955, respectively [R. 21, 23], relying upon the decision of this Court in *Schwinn v. United States*, 112 F. 2d 74, 75-76 (C.C.A. 9, 1940), affirmed 311 U. S. 616 [R. 36]. After answers were filed by appellees [R. 23-30], the Court ordered the causes consolidated for trial [R. 35].

Trial commenced on February 28, 1956 [R. 43]. On the opening day of trial, affidavits showing good cause relating to both appellees were offered and received in evidence [R. 123-127, Exs. 1 and 16]. At the same time counsel for appellant offered to testify that when the complaints were filed, the affidavits were in possession of the office of the United States Attorney. Counsel for



each of the appellees, however, stipulated that counsel for appellant would so testify [R. 124-125]. These affidavits had been shown to counsel for appellee Freeda Diamond at a pre-trial conference and said counsel had been informed that they were to be introduced at trial as to both appellees [R. 125, 126]. On February 29, 1956, a copy of the affidavits was served on counsel for each of the appellees [R. 238-239]. Trial proceeded, during which appellant offered the testimony of nine witnesses: four naturalization examiners [R. 45-172]; three former members of the Communist Party [R. 173-385], one handwriting expert [R. 385-392], and one fingerprint expert [R. 394-396]; and forty-three exhibits were received in evidence on behalf of appellant [Exs. 1 through 29 and 31 through 44]. On March 2, 1956, the trial was continued in order to allow counsel for appellees an opportunity to prepare for further cross-examination of certain of appellant's witnesses [R. 415-416, 418].

On May 4, 1956, when trial recommenced [R. 419], appellees waived further cross-examination of appellant's witnesses, and rested their cases [R. 419]. The Court took the causes under submission [R. 421] and gave each of the parties 30 days to file briefs on the effect of the decision of the Supreme Court in *United States v. Zucca*, 351 U. S. 91, which had been rendered on April 30, 1956 [R. 421].

On July 27, 1956, the Court entered its Order dismissing appellant's actions without prejudice [R. 39]. The present appeals are being taken from the District Court's Order of Dismissal.

### **Statement of Points.**

The following statement of points applies to each of the appeals:

(1) The District Court erred in dismissing appellant's action to revoke and set aside the Order admitting appellee to citizenship and to cancel his/her Certificate of Naturalization.

(2) The District Court erred in holding that appellant's failure to file an affidavit pursuant to Section 340(a) of the Immigration and Nationality Act at the time the action was instituted was jurisdictional.

(3) The District Court erred in refusing to recognize the Affidavit filed by appellant during trial as a sufficient compliance with Section 340(a) of the Immigration and Nationality Act.

(4) The District Court erred in refusing to recognize the evidence adduced by appellant during trial as a cure of any defect which may have arisen by reason of appellant's failure to file an Affidavit at the time the action was instituted.

(5) The District Court erred in refusing to adjudicate the action upon its merits, since the entire trial had been completed and the cause taken under submission.

### **Questions Presented.**

1. Was the omission of appellant to file with the complaints affidavits showing good cause, which were then in possession of the United States Attorney, a jurisdictional defect so as to require dismissal of the appellant's

actions after trial was completed and the causes taken under submission?

2. Was the defect, if any, arising from appellant's omission to file affidavits showing good cause with the complaints thereafter cured?

3. Did the District Court err in dismissing appellant's actions since appellees were in no way prejudiced by the initial omission of appellant to file affidavits showing good cause?

### **Statutes Involved.**

Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A. §1451(a), provides in part:

“Sec. 340(a). It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: \* \* \*”

### Summary of Argument.

The filing of the affidavit required by Section 340(a) of the Immigration and Nationality Act is procedural, rather than jurisdictional; and the fact that it is not filed when the original complaint is filed does not render the proceedings void *ab initio* as the Court below seemed impelled by the decision in *United States v. Zucca*, 351 U. S. 91 (1956), to hold. Appellant's position is in accord with the language of the majority in *Zucca*, and with the decisions of most of the district courts that have considered the question. Moreover, the procedural nature of the requirement that the affidavit be *filed* is more clearly delineated in the instant cases than in *Zucca*. The *Zucca* decision does not indicate that an affidavit showing good cause was even in existence; whereas in the cases at bar affidavits as to both appellees were in possession of the United States Attorney when the complaints were filed.

Whether the filing requirement be deemed procedural or jurisdictional, initial noncompliance by appellant was cured through receipt in evidence of the affidavits and through evidence produced by appellant during trial, which not only showed good cause for instituting the actions, but established the allegations of the complaints by clear, convincing, and unequivocal evidence. Thus, appellees were in no way prejudiced by the fact that the affidavits were not filed originally, and the defect resulting, if any, was harmless. Appellees are not innocent persons whose reputation has been tarnished by unfound litigation. The Government was fully warranted in bringing denaturalization suits against them.

## ARGUMENT.

### I.

The Omission of Appellant to File With the Complaints Affidavits Showing Good Cause, Which Were Then in Possession of the United States Attorney, Was Not a Jurisdictional Defect so as to Require Dismissal of Appellant's Actions.

The District Court apparently interpreted the Supreme Court's decision in *United States v. Zucca*, 351 U. S. 91 (1956), to mean that any suit for denaturalization instituted without an affidavit showing good cause having been filed before or at the time the complaints are filed, is void *ab initio*, and is required to be dismissed. In its Memorandum Opinion, the Court below stated [R. 37]:

“\* \* \* it is my view that the language of the Supreme Court in effect makes the filing of such affidavits *jurisdictional* to the maintenance of denaturalization proceedings. *Any action instituted without the filing of an affidavit is premature and circumvents the provisions of said Section 340.*” (Emphasis added.)

This extreme position would not seem to be justified, either by the language of the majority in *Zucca*, or by the facts of the instant appeals. As the court below noted [R. 37], the Supreme Court studiously avoided characterizing the affidavit requirement as jurisdictional—purposefully, appellant submits. Had the Supreme Court deemed the filing of the affidavit jurisdictional, it would have been impelled to so state, due to the impact such a decision would have on pending cases.<sup>2</sup>

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<sup>2</sup>The Supreme Court was undoubtedly aware of other decisions involving the affidavit question: See, for example, *United States v. Candela*, 131 F. Supp. 249 (S.D. N.Y. Oct. 14, 1954).

On the other hand, repeated references by the majority to “prerequisite to maintenance of” an action and use of the word “procedural,” appellant believes, were words of art designed to forestall an argument that filing of the affidavit was jurisdictional and to convey the view that an omission to file is merely a procedural defect which may be cured or waived. This construction seems particularly justified in view of the fact that the sentence embodying the Court’s ultimate conclusion speaks of the requirement as “procedural.” The Supreme Court said (351 U. S. at p. 99):

“\* \* \* We hold that this is the only Section under which a United States Attorney may institute denaturalization proceedings, and that the affidavit showing good cause is a *procedural* prerequisite to the maintenance of proceedings thereunder.” (Emphasis added.)

Moreover, the *Zucca* decision itself indicates that the initial failure to file the affidavit is not *ipso facto* fatal. The District Court in *Zucca* did not immediately dismiss the action, but ordered “the complaint dismissed unless the Government filed an affidavit showing good cause within 60 days”<sup>3</sup> (351 U. S. at p. 91). As this was not done the action was dismissed without prejudice. The apparent approval by the Supreme Court of the conditional dismissal by the District Court is persuasive that the Supreme Court did not regard the original omission as vitiating.

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<sup>3</sup>The opinion of the District Court indicates that the period allowed was 15 days, rather than 60 days. See, *United States v. Zucca*, 125 F. Supp. 551, at page 557.

To the same effect:

*United States v. Candela*, 131 F. Supp. 249 (S. D. N. Y., Oct. 14, 1954);

*United States v. Costello* (S. D. N. Y., Dec. 9, 1955—opinion not reported).

Subsequent to the *Zucca* decision, District Courts have generally adopted the view that omission to file the affidavit when the original complaint is filed does not render the proceedings void *ab initio*. In *United States v. Costello*, Civ. 79-309 (S. D. N. Y., May 21, 1956—opinion not reported), the original complaint was filed on October 22, 1952, while an affidavit showing good cause was not filed until November 17, 1955. Judge Dimock, in denying Costello's motion to dismiss, declared:

"The question is thus presented whether the Supreme Court meant that filing was a jurisdictional prerequisite or merely a procedural prerequisite. *R. F. C. v. Prudence Group*, 311 U. S. 579. I can find nothing in the opinion which would indicate that the Supreme Court regarded the requirement as jurisdictional. There is no suggestion that a denaturalization order would be void if the affidavit had not been filed with the complaint. There is no suggestion that a court could not, upon proper terms, permit the late filing of the affidavit in a pending proceeding. On the other hand, in five places in the opinion, the word 'procedural' is applied to the requirement."

In *United States v. Rocco Pelligrino*, Civ. 93-366 (S. D. N. Y., Oct. 11, 1956—opinion not reported), the court granted the Government's motion to amend the complaint to include the affidavit, late filing of the affidavit was permitted in *United States v. James K. Yanoff* (S. D.

Ohio, July 31, 1956), and other District Courts have denied motions to dismiss because the affidavit was not filed with the original complaint (*United States v. Sam Adel*, Civ. No. 17522 (S. D. Calif., April 1, 1957—no opinion); *United States v. Matles* (E. D. N. Y., Aug. 14, 1956—no opinion); *contra: United States v. Gaetano Lucchese*, Civil No. 13052 (E. D. N. Y., now pending on appeal before the United States Court of Appeals for the Second Circuit)).

Moreover, the *Zucca* decision is distinguishable from the present appeals. In *Zucca*, there was no showing that an affidavit showing good cause was even in existence at the time the complaint for denaturalization was filed. Before the Supreme Court the Government apparently took the position that the power to maintain denaturalization suits was found in the general duty of United States Attorneys to prosecute all civil actions in which the United States was concerned and that an affidavit was required only when the proceeding was to be brought on the complaint of a private citizen (see 351 U. S. at p. 95). In the case at bar, however, affidavits showing good cause were in possession of the United States Attorney at the time the complaints were filed [R. 124-125]. The instant actions were not instituted by the United States Attorney upon his own initiative, but upon affidavits showing good cause.



II.

**The Defect, if Any, Arising From Appellant's Omission to File Affidavits Showing Good Cause With the Complaints Was Thereafter Cured.**

Procedural defects, or even in some cases jurisdictional defects, may be cured by subsequent proceedings.

*Fujii v. Dulles*, 224 F. 2d 906 (C. A. 9, 1955);

*Milleson v. United States*, 78 F. 2d 60 (C. C. A. 8, 1935);

*Liquid Veneer Corporation v. Smuckler*, 90 F. 2d 196, 202 (C. C. A. 9, 1937);

*Third Nat. Bank & Trust Co. v. United States*, 53 F. 2d 599 (C. C. A. 6, 1931).

In *Third Nat. Bank & Trust Co. v. United States*, *supra*, where in an action on a war risk policy a preliminary motion had been made to compel defendant to produce records of the Veterans Bureau, the Court declared (p. 601):

“\* \* \* We conclude, therefore, that plaintiff's motion should have been sustained, and the defendant required to produce the record for inspection by plaintiff's counsel; but *as it was produced at the trial and there is nothing to show that the failure to produce it earlier resulted in prejudice*, we further conclude that the overruling of the motion was not prejudicial error.” (Emphasis added.)

And in *Liquid Veneer Corporation v. Smuckler*, *supra*, where a motion to dismiss on jurisdictional grounds had been denied, this Court said (p. 202):

“[3, 4] If error was committed in denying defendant's motion to dismiss made at the commence-

ment of the trial, or the denial of its objection to the introduction of any evidence, this *was cured by the amendment to the complaint during the course of the trial*, nor was there error in permitting the amendment. *No substantial right was prejudiced.*" (Emphasis added.)

Again, in *Fujii v. Dulles, supra*, this Court permitted a claimed jurisdictional defect to be cured by supplemental pleadings, even though the statute under which jurisdiction was invoked had been repealed at the time the pleading was allowed.

In the instant cases any defect arising from appellant's omission to file affidavits showing good cause with the complaints was cured by receipt of the affidavits in evidence [R. 123-127, Exs. 1 and 16], and by evidence produced by the Government during trial. The Government offered the testimony of nine witnesses: four naturalization examiners [R. 45-172]; three former members of the Communist Party [R. 173-385], one handwriting expert [R. 385-392], and one fingerprint expert [R. 394-396]; and forty-three exhibits were received in evidence on behalf of appellant [Exs. 1 through 29 and 31 through 44]. This evidence, it is submitted, not only showed good cause for commencing the present actions, but established the allegations of the complaints by clear, convincing and unequivocal evidence.

While no attempt will here be made to summarize all of the evidence, it should be noted that the First Cause of Action<sup>4</sup> alleges wilful misrepresentation and concealment

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<sup>4</sup>The Second Cause of Action was dismissed as to appellee David Diamond [R. 22] and stricken as to appellee Freeda Diamond [R. 23].

of material facts concerning matters which may be synthesized into three categories:

1. The fact that appellees had used and had been known by names other than those given during naturalization proceedings.
2. The fact that appellees were at the time of their naturalization and had been prior thereto members of the Communist Party.
3. The fact that appellees' intentions and state of mind were different from those represented during naturalization proceedings.

It is clear that appellee David Diamond had previously used the names of Abe Slater and David Thornson. On January 16, 1932, he was arrested by the Police Department, Long Beach, California, at which time he gave the name of Abe Slater [Ex. 13].<sup>5</sup> During or about 1933 appellee David Diamond executed in his own handwriting [R. 387] a Registration Card for the Communist Party in the name of David Thornson [Ex. 9, R. 201-204, 323-324]. He was also known by witnesses William Ward Kimple and John L. Leech to have used the name David Thornson as a Communist Party name [R. 203, 322].

Yet during naturalization proceedings appellee David Diamond failed to disclose his prior use of the names David Thornson and Abe Slater, notwithstanding the many opportunities he had to do so. On documents bear-

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<sup>5</sup>At the time of his arrest appellee David Diamond was fingerprinted, and during trial a fingerprint expert testified that the fingerprints appearing on Ex. 13 were the same as those appearing on Ex. 12, which bears the signature "David Diamond". The latter signature was proved by the testimony of a handwriting expert [R. 388].

ing his signature<sup>6</sup> and requiring him to give any other names used, he gave only the names David Diamond, Dave Diamond, and David Dumanus [Ex. 3, item 1; Ex. 4, item 3, p. 1, and item (1), p. 3; Exs. 2 and 5, item (1)]. While being questioned under oath [R. 50] by the preliminary naturalization examiner he was specifically asked to give any name he had used at any time, and he still failed to disclose the names of David Thornson and Abe Slater [R. 52-55, 66-68]. And again, while being examined by the designated naturalization examiner he swore that the statements he had previously made during naturalization proceedings were true [R. 85].

It is equally clear that appellee Freeda Diamond had previously used the name of Florence Slater.<sup>7</sup> Two Communist Party membership books were issued to her in the name of Florence Slater [Exs. 26 and 27] and she signed a receipt for one of these books [Ex. 28] in her own handwriting [R. 390-392]. Witness Kimple knew that appellee Freeda Diamond used the Communist Party name of Florence Slater [R. 208-209]. Yet she failed to disclose during naturalization proceedings her prior use of the name Florence Slater. This name was not disclosed on various naturalization documents bearing her

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<sup>6</sup>The authenticity of the signatures of appellee David Diamond on the various naturalization documents was admitted in a stipulation during trial, which was read into the record [R. 112-117].

<sup>7</sup>The alleged prior use of the names Freida Slater and Freda Slater as shown in the original complaint [R. 15] was deleted by stipulation during trial [R. 118].

signature<sup>8</sup> and requiring her to disclose all names she had previously used [Ex. 18, item 1; Ex. 19, item (3), p. 1 and item (1), p. 3; Exs. 17 and 20, item (1)]; nor when she was questioned under oath concerning prior names by the preliminary naturalization examiner [R. 152-155].

The wilful misrepresentation and concealment by appellees of the fact that they had previously used other names in itself established good cause for instituting actions against them; since concealment and misrepresentation of a fact may constitute grounds for denaturalization, even though the fact, if revealed would not have prevented naturalization (*United States v. Montalbano*, 236 F. 2d 757, 759-760 (C. A. 3, 1956); *Corrado v. United States*, 227 F. 2d 780, 784 (C. A. 6, 1955), cert. den. 351 U. S. 925; and note *United States v. Marcus*, 1 F. Supp. 29 (D. N. J., 1932), where a certificate of naturalization was cancelled upon the sole ground that the defendant had falsely stated in her Petition for Naturalization that she was single, whereas in fact she was married).

However, the other grounds for denaturalization were equally well established although appellant will only comment upon the evidence. The uncontradicted and unimpeached testimony of three witnesses, buttressed by official documents of the Communist Party, established appellees' membership and activities in the Communist Party, be-

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<sup>8</sup>The signatures of appellee Freeda Diamond on naturalization documents relating to her were admitted in her Answer to Plaintiff's Request for Admissions [R. 31-34].

ginning in the case of appellee husband as early as 1922 [Exs. 8 and 9], and continuing in the case of both appellees during 1944 [R. 369-383].<sup>9</sup> Both appellees were asked questions by naturalization examiners which called for a revelation of their membership in the Communist Party [R. 55-56, Exs. 23, 24; R. 100-107, 151]; yet this membership was not disclosed. Their long continued and active participation in the program of the Communist Party shows that they had embraced the principles of Communism and were not attached to the principles of the Constitution of the United States,<sup>10</sup> rendering their oaths of allegiance and other statements relating to their state of mind and intentions false.

It is therefore submitted that whether filing of the affidavit be deemed procedural or jurisdictional, any defect arising from the initial failure of the Government to file affidavits in the instant cases was cured when on March 2, 1956 the Government rested its case [R. 402].

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<sup>9</sup>Both the court and opposing counsel were apparently well satisfied that membership in the Communist Party had been clearly established. Counsel for appellee David Diamond stated [R. 413]:

“Mr. Brock: There is enough evidence on membership that nothing Mr. Dooley could add to it would make it any greater than it already is. He knows that, we know it and the court knows it.”

<sup>10</sup>As Judge Yankwich pointed out in *United States v. Title*, 132 F. Supp. 185 (S.D. Cal., 1955) at page 196:

“One who embraces a totalitarianism which extolls the achievements of a party which attained its end by violent revolution and civil war and which openly and avowedly repudiates democracy and liberty as we understand them cannot be said to be ‘attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.’”

### III.

#### The District Court Erred in Dismissing Appellant's Actions Since Appellees Were in No Way Prejudiced by Appellant's Initial Omission to File Affidavits Showing Good Cause.

It is well established that errors as to procedure are harmless unless prejudice results (*Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259-260 (1922); *West v. Camden*, 135 U. S. 507, 521 (1890); *Lancaster v. Collins*, 115 U. S. 222, 227 (1885); *Mobile & Montgomery R. Co. v. Jurey*, 111 U. S. 584, 593 (1883); *Decatur Bank v. St. Louis Bank*, 88 U. S. 294, 301 (1874); *Nolander v. Butte Valley Irr. Dist.*, 132 F. 2d 704, 706 (C. C. A. 9, 1942); *Sacramento Suburban Fruit Lands Co. v. Lindquist*, 39 F. 2d 900 (C. C. A. 9, 1929), cert. den. 282 U. S. 853; *United States Casualty Co. v. Drew*, 5 F. 2d 498 (C. C. A. 9, 1913); 5 C. J. S., Appeal & Error, §1680). This rule is equally applicable to criminal cases (*Bowles v. United States*, 319 U. S. 33 (1943)), even though a statutory provision has not been complied with (*Segurolo v. United States*, 275 U. S. 106, 109-110 (1927); *Seadlund v. United States*, 97 F. 2d 742 (C. C. A. 7, 1938)).

Appellees were in no way prejudiced through the original omission of the Government to file affidavits showing good cause. These affidavits had been shown to counsel for appellee Freeda Diamond at a pre-trial conference and said counsel had been informed that they were to be introduced at trial as to both appellees [R. 125, 126]. On February 28, 1956, the opening day of trial, the affidavits were received in evidence [R. 123-127], and the next day a copy was served upon counsel for appellees [R. 238-239]. During trial, not only was good cause shown for instituting actions for denaturalization against appellees,

but clear and convincing evidence was produced establishing the allegations of the complaints.

The basic reason advanced by the Supreme Court for the affidavit requirement was to prevent a citizen from being subjected to a suit for denaturalization, with its "serious consequences" to his reputation without justification (351 U. S. pp. 99-100). In the instant appeals appellees are not innocent persons who have been subjected to unfounded litigation. Evidence produced at trial clearly established that the Government was fully warranted in bringing denaturalization suits against them.

### Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the Order of the District Court should be reversed and the causes remanded, with directions to adjudicate each of the actions against appellees upon its merits.

Respectfully submitted,

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No. 15393

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

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*Appellees.*

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## APPELLEES' BRIEF.

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FILE

MAY 24 1957

PAUL P. O'BRIEN, C



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## APPELLEES' BRIEF.

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### Question Presented.

Whether the filing of affidavits of good cause during the course of the denaturalization trial, which affidavits were received into evidence over the objections of defendants' counsel, was a sufficient compliance with Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A. 1451(a) which requires the filing of an affidavit of good cause as a prerequisite to institution of denaturalization proceedings.

### Summary of Argument.

Section 340(a) of the Immigration and Nationality Act provides that United States attorneys, upon affidavits showing good cause therefor, may institute proceedings for denaturalization. In *United States v. Zucca*, 351 U. S. 91 (1956), the Supreme Court held that the plain meaning of this statutory requirement was that the filing of the affidavit was a prerequisite to maintaining a denaturalization suit. In the instant case no affidavit of good cause was filed prior to trial, but appellant offered into evidence, during the course of the trial, the affidavits of good cause which allegedly were in its possession at the time the denaturalization suits were instituted.

The Complaints were properly dismissed because the statutory requirement was not met and rights of appellees were prejudiced because they had no opportunity to test the sufficiency of the affidavits, and because they were denied full opportunity to avail themselves of pre-trial discovery proceedings based upon information which would have been disclosed to them by the affidavits of good cause. Filing of the affidavits as exhibits after commencement of the trial did not satisfy the statutory requirements and did not mitigate the prejudice to appellees' rights.

## ARGUMENT.

### I.

#### The Omission of Appellant to File With the Complaints Affidavits Showing Good Cause Rendered the Complaints Fatally Defective.

Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A., Section 1451(a), provides in part:

“It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Section 310 of this title . . . .”

In *United States v. Zucca*, 351 U. S. 91, at page 94, the Supreme Court said:

“Were we obliged to rely solely on the wording of the statute, we would have no difficulty in reaching the conclusion that the filing of the affidavit is a prerequisite to maintaining a denaturalization suit.”

Again at page 95 of the *Zucca* case, the Court said:

“The natural meaning of the language used in Sec. 340(a) is that filing of the affidavit is a procedural prerequisite to maintenance of the suit.”

At page 99 of the *Zucca* case the Court said:

“This proceeding was concededly brought under Sec. 340(a). We hold that this is the only Section under which a United States attorney may institute denaturalization proceedings, and that the affidavit showing good cause is a procedural prerequisite to the maintenance of proceedings thereunder.”

In concluding the *Zucca* decision the Court said at page 100:

“We believe that, not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause.”

In view of the clear language of the Statute and the even clearer language of the *Zucca* decision, the appellant now contends that “prerequisite to the initiation of such proceedings” means “post-requisite” to the initiation of denaturalization proceedings.

The affidavits filed in the instant case did not comply with the statutory requirement; the “prerequisite” has not been met; therefore, whether the requirement of the filing of the affidavits be considered jurisdictional or procedural, the complaints were properly dismissed.

## II.

### **Appellant's Failure to Comply With Prerequisites of Maintaining the Action Could Not Be, and Was Not Thereafter Cured or Waived.**

Appellant apparently argues that since the requirement of affidavits showing good cause are procedural and not jurisdictional the requirement could be waived, or the failure to file an affidavit showing good cause at the commencement of the action could later be cured. This argument implies that appellant feels that the complaints should at least be dismissed conditionally—until a proper affidavit is filed giving appellees sufficient time to test its sufficiency. This, however, was not done and, therefore,



even under appellant's own reasoning the failure to file the affidavit was not at any time cured.\*

It may also be said, however, that appellees at no time waived their rights regarding the filing of an affidavit showing good cause and, prior to trial, moved the Court to dismiss the complaints on the ground that the Court did not have jurisdiction over the actions because the complaints were not supported by affidavits showing good cause [R. 14, 22]. Further, when the affidavits showing good cause were received into evidence, it was over the objections of defendants [R. 123-127].

Appellees' motion to strike the affidavits [R. 239] was never ruled upon by the Court. Clearly, appellees never waived appellant's failure to timely file the affidavits.

### III.

#### **Appellant's Failure to File Affidavits at the Commencement of the Actions Prejudiced Rights of Appellees.**

"The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citi-

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\*The District Court in the *Zucca* case, 125 Fed. Supp. 551, originally ordered "the complaint dismissed unless the Government filed an affidavit showing good cause within 60 days." (351 U. S. at pp. 91, 92.) The affidavit was not filed and the complaint was dismissed *unconditionally*, but without prejudice to the Government to file a new action properly. It was the order of the district court which dismissed the complaint unconditionally but without prejudice that was affirmed by the Supreme Court. (351 U. S. at p. 94.)

zenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded."

*United States v. Zucca*, 351 U. S. 91, 99.

"The complaint, under modern practice, is required merely to allege ultimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship."

*United States v. Zucca*, 351 U. S. 91, 98.

See also:

*United States v. Salomon*, 231 Fed. 928 (C. A. 5th, 1916);

*United States v. Richmond*, 17 F. 2d 28 (C. A. 3rd, 1927).

Not only did Congress intend that denaturalization suits should not freely be instituted without a preliminary showing of good cause, but it also contemplated that defendants in such cases should have the right to test the sufficiency of affidavits which would be used as the basis of denaturalization suits.

". . . But the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial. (*United States v. Zucca*, 125 Fed. Supp. 551, 556.) We think it manifest that it was intended that the required affidavit should state facts constituting 'good cause' for instituting the proceedings and should do more than point out errors of law in the procedure which led up to denaturalization. (*United States v. Salomon*, 231 Fed. 928, 930 (C. A. 5th, 1916).) To require the filing of evidential affidavits

implies, as Zucca contends, extensive testing of their sufficiency before trial. The defendant is thus given two chances at the Government's case."

*United States v. Zucca*, dissenting opinion at page 103.

Having been denied the right to test the sufficiency of the affidavit prior to trial, appellees were subjected to suit without any preliminary showing by appellant that appellees' certificates of citizenship might properly have been denied at the time they were granted. The requirements of the affidavit of good cause have long been recognized as the safeguard against this procedure. In *United States v. Salomon*, 231 Fed. 928 at page 930, and in *United States v. Richmond*, 17 F. 2d 28 at page 30, the Courts said:

"The conclusion is that the statutory remedy [of denaturalization] would be perverted from its obvious purpose of safeguarding things of substance, if it is permitted to be successfully resorted to, without any showing that the issue of the attacked certificate of citizenship might properly have been denied at the time it was granted . . . ."

Since the purpose of the requirement of an affidavit is to provide a preliminary showing of good cause and to afford defendants in denaturalization suits the opportunity to test the sufficiency of the affidavits prior to trial, appellant's theory that the affidavits may be filed at any time renders the affidavit requirement meaningless and makes the *Zucca* decision a nullity. The affidavit is required as a prerequisite to suit to protect the government "while safeguarding citizenship from abrogation except by a clearly defined procedure . . . ." (*Bindczyck v. Finucane*, 342 U. S. 76, 83.) Citizenship cannot be safeguarded if naturalized citizens are deprived of the exercise of

the rights enacted for their protection by the whim of the government. The Department of Justice memorandum which is quoted by the Supreme Court in a footnote at page 97 of the *Zucca* decision states that “. . . the defendant can probably obtain most of the government’s evidence by a proper utilization of the methods of discovery provided in Rules 16, 33 and 34.” Apparently affidavits were not attached to the complaints in the instant cases in order to “reduce the ordinary chance of discovery rules being employed . . .” (Circular No. 3663, Department of Justice, Supp. No. 9, April 6, 1943, p. 87.) Of this practice the Supreme Court took a dim view, stating that:

“We think that the public interest is not served by taking such liberties with a specific statutory requirement designed for the protection of naturalized citizens.”

*United States v. Zucca*, 351 U. S. 91, 98.

Having been deprived of their rights to test the sufficiency of the affidavits prior to trial and to make use of the information which would have been supplied to them by the affidavits, appellees also were deprived of effective use of discovery proceedings and, therefore, were deprived of a fair trial on the merits of the action. To argue, as appellant does in its brief at page 12, that “any defect arising from appellant’s omission to file affidavits showing good cause with the complaints was cured by receipt of the affidavits in evidence, . . . and by evidence produced by the Government during the trial” is tantamount to suggesting that where statutory and Constitutional rights admittedly have been violated in the gathering of evidence, *e.g.*, by an illegal search and seizure, the “defect” is nevertheless “cured” by introduction of evidence obtained in such a manner during the course of the

trial. Citations to cases should not be necessary to underscore this point of deprivation of due process.

Further, to agree with appellant's contention that the affidavits may be filed at any time is to ignore the significance of a related portion of Section 340 which was enacted for the protection of naturalized citizens, and would create administrative problems for the courts. In addition to the affidavit requirement, Section 340, in paragraph (b), provides that defendants shall have 60 days to answer the Government's complaint. This provision contemplates that defendants should have a like time to examine the affidavit; if the affidavit does not accompany the complaint it may be necessary to suspend court proceedings for 60 days while defendants examine the affidavits. The examination may lead to discovery proceedings, motions and hearings—all of which should properly precede the filing of the answer by defendants. Appellees were denied 60 days to examine the affidavit and complaint; they were not served with copies of the affidavits until the second day of trial; therefore they were not granted the statutory time in which to answer the complaint.

Appellant makes an effort to distinguish the cases at bar from the *Zucca* case by stating that in the instant case affidavits showing good cause were in the possession of the United States Attorney when suit was instituted, while in *Zucca* there was no showing that an affidavit was even in existence. (Br. p. 10.) The *Zucca* case, however, shows that possession of the affidavit by the United States Attorney is not sufficient compliance with the statute. "We believe that, not only in some cases but in all cases the District Attorney must, as a prerequisite to the initiation of such proceedings, file an Affidavit Showing Good Cause." (*United States v. Zucca*, 351 U. S. 91, 100.)

This language makes it clear that it is the United States Attorney for each district who must file the Affidavit Showing Good Cause, and as this was not done in the instant case, the Complaints were properly dismissed.

Appellant cites several District Court cases, decided subsequent to *Zucca*, where late filings of affidavits were permitted or motions to dismiss because the affidavits were not filed with the complaints were denied. Appellees believe said cases to be clearly erroneous in that they are directly contrary to the language and decision of the Supreme Court in *Zucca*. It may be observed, however, that even in these cases the affidavits were filed *prior* to trial, thus giving defendants in those cases some opportunity to test their sufficiency and to make use of the information contained therein for discovery proceedings. Other courts have decided in accordance with *Zucca* and have dismissed complaints filed without the affidavit. (*United States v. Lucchese*, Civil No. 13052 (E. D. N. Y., now pending an appeal before the United States Court of Appeals for the Second Circuit), and *United States v. Sweet*, Civil No. 13349 (E. D. Mich., decided March 29, 1957).)

### Conclusion.

For the reasons stated above it is respectfully submitted that the Order of the District Court dismissing the Complaints should be affirmed.

Respectfully submitted,

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No. 15393

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

DAVID DIAMOND, etc., and FREEDA DIAMOND, etc.,

*Appellees.*

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## APPELLANT'S REPLY BRIEF.

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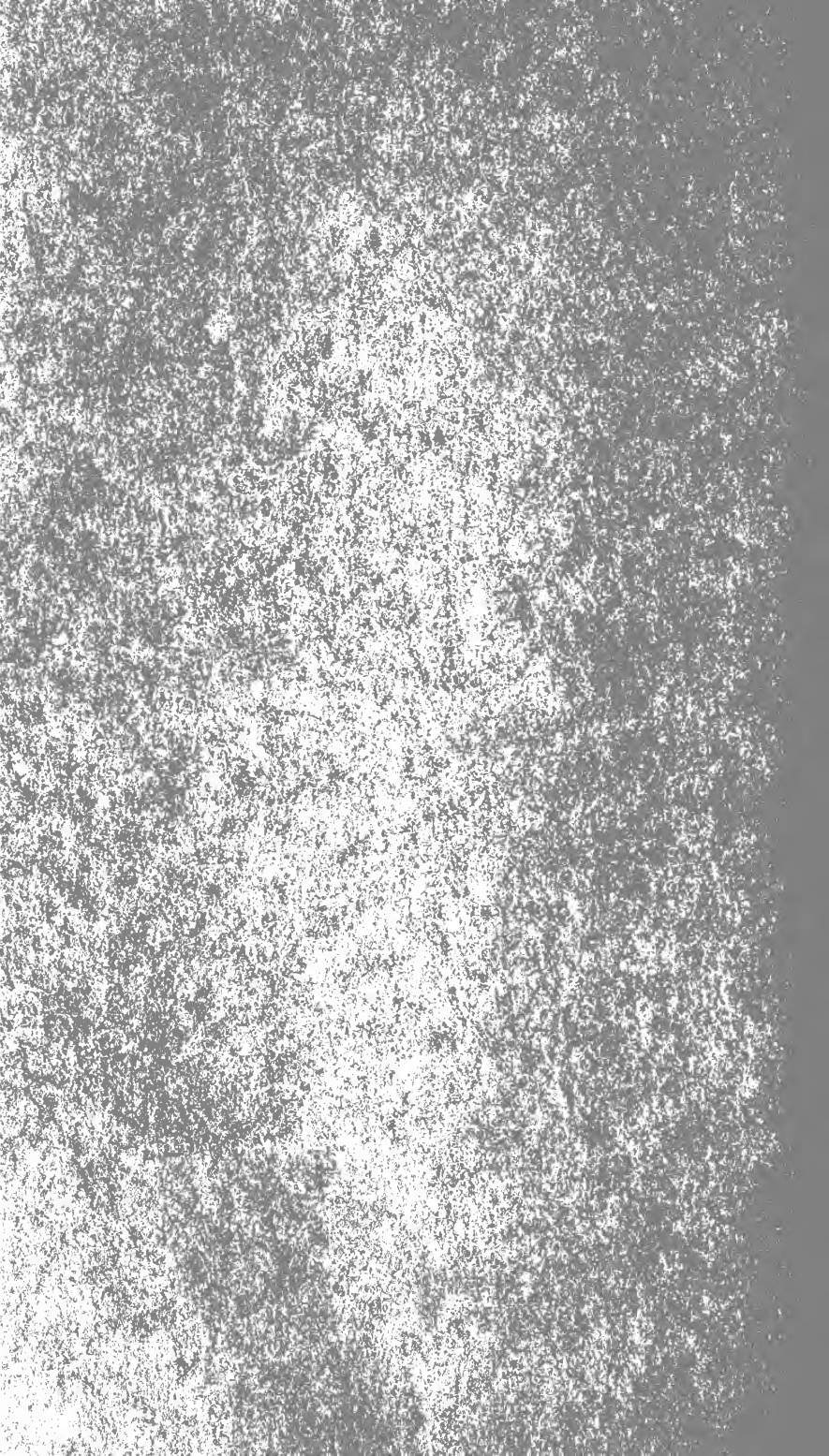
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No. 15393  
IN THE  
**United States Court of Appeals**  
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UNITED STATES OF AMERICA,

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*Appellees.*

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**APPELLANT'S REPLY BRIEF.**

---

**I.**

**The Omission of Appellant to File With the Complaints Affidavits Showing Good Cause Did Not Render the Complaints Fatally Defective.**

Appellees' argument implies that appellant is seeking to establish a rule of law governing the time when affidavits showing good cause in future cases must be filed. (Br. 4, 7. 9.)<sup>1</sup> This, however, is not true. Undoubtedly,

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<sup>1</sup>"Br." indicates reference to Appellees' Brief. "R." refers to the printed Transcript of Record.

On page 4 of their Brief, appellees state: ". . . the appellant now contends that 'prerequisite to the initiation of such proceedings' means 'post-requisite' to the initiation of denaturalization proceedings." And on page 7: ". . . appellant's theory that the affidavits may be filed at any time renders the affidavit requirement meaningless . . ." Again, on page 9: ". . . to agree with appellant's contention that the affidavits may be filed at any time . . . would create administrative problems for the courts." Appellant submits that a decision in its favor on the facts of the instant appeals would create no future administrative problems.

as a result of the decision of the Supreme Court in *United States v. Zucca*, 351 U. S. 91 (1956), affidavits showing good cause will be filed with all future complaints for denaturalization. It is the position of appellant that the Supreme Court in *Zucca* did not intend that a suit for denaturalization, which was in the status of the instant cases when its decision was rendered, should be dismissed merely because an affidavit showing good cause was not filed with the original complaint. The position of appellant is based upon the *facts of the cases at bar*.

In the present cases, the complaints were filed on November 1, 1954. [R. 3-19.] At that time affidavits showing good cause as to both appellees were in the possession of the United States Attorney. [R. 124-125.] Appellees' motions to dismiss the complaints because the affidavits had not been filed were denied by the District Court [R. 21, 23] upon the authority of *Schwinn v. United States*, 112 F. 2d 74, 75-76 (C. C. A. 9, 1940), affirmed 311 U. S. 616 [R. 36], *then a binding precedent*. Trial commenced on February 28, 1956; and on the opening day of trial, affidavits showing good cause relating to both appellees were received in evidence [R. 123-127, Exs. 1 and 16], and counsel for appellees were served with a copy the next day. [R. 238-239.] When the Supreme Court on April 30, 1956 rendered its decision in *Zucca*, trial was almost completed, the Government having presented all of its evidence and rested its case. [R. 402, 419-421.]

Under such circumstances, did the Supreme Court by its decision in *Zucca* intend that the present actions be dismissed and new actions commenced? Appellant believes not on the following grounds: (1) the requirement that an affidavit showing good cause be filed is procedural

rather than jurisdictional; (2) the defect, if any, arising from appellant's initial omission to file the affidavits was thereafter cured; (3) appellees were in no way prejudiced through appellant's initial omission to file the affidavits.

In addition to those cases cited in Appellant's Opening Brief<sup>2</sup> (pp. 9-10), other district court cases have held that failure to file the affidavit with the original complaint is not fatal. (*United States v. Ercole*, 148 Fed. Supp. 481 (E. D. N. Y., 1957); *United States v. Davis*, 149 Fed. Supp. 249 (E. D. Mich., 1957); *United States v. George Kiros*, E. D. Mich., Dec. 31, 1956—opinion not reported; *United States v. Salvatore Laurenti* (N. D. Ohio, Jan. 15, 1957—no opinion.)

In *United States v. Davis*, *supra*, the court, after an analysis of the *Zucca* opinion, concluded (p. 251):

“\* \* \* We, therefore, think the only fair interpretation to be that the affidavit must be filed in order for the suit to be ‘maintained,’ and that the failure to file an existing affidavit (which is the case here) at the time of commencement of suit *is not a jurisdictional defect but is a procedural one which may be cured.*” (Emphasis added.)

It may be conceded, as appellees contend (Br. 10), that in the district court cases relied upon by appellant, the affidavits were filed prior to trial. However, those cases clearly hold that failure to file the affidavit with the original complaint is procedural rather than jurisdictional and is not *ipso facto* fatal. If this Court finds that the

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<sup>2</sup>The following cases were cited in Appellant's Opening Brief as not being reported (pp. 9-10): *United States v. Costello*, 142 Fed. Supp. 290 (S. D. N. Y., 1956); *United States v. Costello*, 142 Fed. Supp. 325 (S. D. N. Y., 1955).

affidavit requirement is procedural, the decision of the Court below should be reversed, since its order of dismissal was based upon the premise that the affidavit requirement was jurisdictional and that the initial omission to file rendered the proceedings void *ab initio*. [R. 36-39.]<sup>3</sup> For this reason the District Court did not pass upon appellant's contention that the original defect, if any, had been cured. [R. 37.]

## II.

### **The Defect, If Any, Arising From Appellant's Omission to File Affidavits Showing Good Cause With the Complaints Could Be, and Was Thereafter Cured.**

Appellees urge that appellant's "argument implies that appellant feels that the complaint should at least be dismissed conditionally—until a proper affidavit is filed giving appellees sufficient time to test its sufficiency." (Br. 4.) Appellant's argument is subject to no such interpretation. It is the position of appellant that the instant actions should not have been dismissed at all. The defect, if any, arising from the initial omission to file affidavits showing good cause could be and was thereafter cured by the receipt of the affidavits in evidence during trial and the production by the Government of evidence during trial, which not only showed good cause for instituting the suits, but established the allegations of the complaints by clear, convincing, and unequivocal evidence. (See pp. 11-16, Appellant's Op. Br.) These two bases for curer operated alternatively as well as cumulatively. Since appellees were

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<sup>3</sup>This Court may consider the Opinion of the District Court in order to determine the basis of its decision (*Mar Gong v. Brownell*, 209 F. 2d 448, 450 (C. A. 9, 1954)).

were in no way prejudiced by the fact that the affidavits were not filed with the original complaints (See pp. 17-18 of Appellant's Op. Br. and discussion in Part III, *infra*), no grounds existed even for a conditional dismissal.

### III.

#### **Appellees Were in No Way Prejudiced Through Appellant's Omission to File Affidavits Showing Good Cause With the Complaints.**

Appellees contend that having "been denied the right to test the sufficiency of the affidavit prior to trial, appellees were subjected to suit without any preliminary showing by appellant that appellees' certificates of citizenship might properly have been denied at the time they were granted." (Br. 7.) However, they point to no substantial right which was thereby prejudiced. In view of the evidence adduced during trial, appellees certainly are in no position to claim that their "reputation" was "tarnished" and their "standing in the community damaged" without justification. (*United States v. Zucca*, 351 U. S. 91, 99 (1956); Br. 5.)

Nor were appellees prejudiced by their inability to test the sufficiency of the affidavits prior to trial. The affidavits received in evidence during trial were sufficient. (*Novak v. United States*, 238 F. 2d 282, 283 (C. A. 6, 1956); *United States v. Davis*, 149 Fed. Supp. 249, 250 (E. D. Mich., 1957); *United States v. Costello*, 142 Fed. Supp. 290, 291-293 (S. D. N. Y., 1956); *United States v. Costello*, 142 Fed. Supp. 325, 326 (S. D. N. Y., 1956).) Appellees suffered no injury merely because they did not get "two chances at the Government's case." (*United States v. Zucca*, 351 U. S. 91, 103 (1956) (dissenting opinion); Br. 7), in view of the fact that good cause for

instituting denaturalization suits against them was shown during trial.

Appellees also urge that the “affidavits were not attached to the complaints in the instant cases in order to ‘reduce the ordinary chance of discovery rules being employed . . .’” (Br. 8.) This contention is refuted by a comparison of the affidavits showing good cause [Exs. 1 and 16] with the complaints. [R. 3-19.] All of the essential information contained in the affidavits was also set forth in the complaints. Thus, appellees were not deprived of effective use of discovery procedures, nor of any motions or hearings which might have resulted therefrom. Even if it be assumed, as appellees contend (Br. 9), that they were entitled to 60 days to examine the affidavits, they were in no way prejudiced.

Appellees cannot contend that any of the evidence produced during trial was *obtained* in violation of their statutory or constitutional guaranties; consequently their attempted analogy between the introduction of illegally obtained evidence and the introduction by the Government of evidence at the trial of the instant cases (Br. 8-9) must fail.

Respectfully submitted,

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No. 15,394

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellant,*

vs.

KURT RIETMANN,

*Appellee.*

On Appeal from the United States District Court for the  
Northern District of California.

BRIEF OF APPELLANT.

---

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No. 15,394

IN THE

**United States Court of Appeals  
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BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
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*Appellant,*

vs.

KURT RIETMANN,

*Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California.**

**BRIEF OF APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

The jurisdiction of the District Court was invoked under Title 28 U.S.C. 2241, which provides in part as follows:

“(a) Writs of habeas corpus may be granted by . . . the District Courts . . . within their respective jurisdictions.

\* \* \* \*

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States . . . ;”

The jurisdiction of the Court of Appeals arises under Title 28 U.S.C. 2253, which provides in part as follows:

“In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had . . .”.

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#### **STATEMENT OF THE CASE.**

The material facts of the case are alleged in the petition and are admitted by the Answer. They are briefly set forth in the Order of the Court below granting the petition for writ of habeas corpus.

Kurt Rietmann, the appellee herein, is a citizen of Switzerland. He first entered the United States when on July 1, 1949 at New York he was admitted as a permanent resident. On March 19, 1951 he applied for and was granted relief from training for service in the Armed Forces of the United States under Sec. 4 of the Selective Service Act of 1948, 50 U.S.C. Appendix 454, which provided that resident aliens might apply for exemption from military service, but if they did so, they would thereafter be debarred from citizenship.<sup>1</sup> On April 1, 1955, preparatory to a con-

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<sup>1</sup>Selective Service Act of 1948 was amended June 14, 1951, 64 Stat. 1073, to make aliens admitted for permanent residence liable for military service without the privilege of applying for exemption on the ground of alienage.



templated trip to Switzerland, appellee, upon his application therefor, was issued a reentry permit by the Immigration and Naturalization Service. He thereafter departed the United States and went to Switzerland. Upon his return to the United States on September 27, 1955, he was denied admittance under the Immigration and Nationality Act of 1952 as an immigrant alien ineligible for citizenship. Pending the outcome of exclusion proceedings, he was paroled into the United States and permitted to proceed to San Francisco, where the proceedings were thereafter conducted. He was held excludable under Section 212(a) (22) of the 1952 Immigration and Nationality Act, as an alien permanently ineligible to become a citizen under Section 315(a) of the said Act. An appeal to the Board of Immigration Appeals was dismissed on February 13, 1956. A motion to reconsider was denied by the Board of Immigration Appeals on June 13, 1956, and on August 3, 1956 the petition for habeas corpus alleging that the Immigration and Naturalization Service erred in finding that he was an excludable alien was filed. An order to show cause issued and the case was submitted on the Immigration and Naturalization Service record of the exclusion proceedings. The Court below granted the petition for writ of habeas corpus and by order dated November 8, 1956 issued the writ of habeas corpus and discharged appellee from the custody of appellant.

The Court will note that the issue of this case is raised by petition for writ of habeas corpus as distinguished from a petition for review or a complaint

for declaratory judgment. Absent the detention of appellee, the issue may have been raised by an action for declaratory judgment. The relief sought does not challenge the sufficiency of the evidence nor the fairness of the hearing, but rather asks the Court to determine appellee's status as a matter of law. Present the detention, the petition for habeas corpus may seek review of the proceedings or the determination of status.

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### **QUESTION PRESENTED.**

The question presented concerns the effect of the Savings Clause, Sec. 405(a) of the Immigration and Nationality Act of 1952 upon appellee's status as an immigrant alien ineligible to citizenship when he sought admission to the United States in 1955. Does Sec. 405(a) save to appellee the provision of Sec. 13(c) of the 1924 Act.

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### **STATUTES INVOLVED.**

Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.):

“Section 101. (a) (8 U.S.C. 1101(15), (19) (27)).

\* \* \* \*

(15) The term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant aliens—”

\* \* \* \*

(Appellee is not a nonimmigrant alien.)

(19) The term 'ineligible to citizenship', when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

\* \* \* \*

(27) The term "non quota immigrant" means—

\* \* \* \*

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad; \* \* \* "

"Section 212. (a) (8 U.S.C. 1182(a)).

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

\* \* \* \*

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens

and who seek to reenter the United States as non-immigrants;”

Section 241(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1251(a):

“(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;” e.g. Sec. 212(a)(22).

\* \* \* \*

“(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) ‘That any such alien entered the United States prior to the date of enactment of his act, or’ (2) that the facts, by reason of which such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.”

Section 315 of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1426:

“(a) Notwithstanding the provisions of Section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces \* \* \* on the ground that he is an alien, and is or was relieved or discharged from such training on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System \* \* \* shall be conclusive as to whether an alien was relieved \* \* \* from such liability for training or service because he was an alien."

Section 405(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1101 Note:

"Savings Clause

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa . . ."

Section 19(a) of the Immigration Act of 1917, 8 U.S.C. Section 155(a) (1946 ed.):

“At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law (e.g. former 8 U.S.C. 213(c)) \* \* \* shall, upon the warrant of the Attorney General, be taken into custody and deported.”

Section 13(c) of the Immigration Act of 1924, 8 U.S.C. Sec. 213(c):

“No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant \* \* \*.”

Section 3 of the Immigration Act of 1924, 8 U.S.C. Sec. 203:

“When used in this chapter the term ‘immigrant’ means any alien departing from any place outside the United States destined for the United States . . .”

Section 4 of the Immigration Act of 1924, 8 U.S.C. Sec. 204:

“When used in this Act the term ‘nonquota immigrant’ means—

. . . (b) an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad; \* \* \*”

Section 3(a) of the Selective Training and Service Act of 1940, 55 Stat. 844, 845:

“Except as otherwise provided in this Act, every male citizen of the United States and every

other male person residing in the United States, who is between the ages of twenty and forty-five \* \* \* shall be liable for training and service in the land and naval forces of the United States: *provided*, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application "to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States \* \* \*."

Section 4(a) of the Selective Service Act of 1948, 62 Stat. 604-606:

"(a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to Section 3 of this title, shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the Presi-

dent; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. \* \* \*

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### **SUMMARY OF ARGUMENT.**

Appellee is an immigrant alien who in 1951 had been lawfully admitted to the United States as a permanent resident. In April, 1955, being then ineligible to citizenship, he departed the United States for Switzerland. At the time of his original admission in 1951, Sec. 13(c) of the 1924 Act gave to an alien ineligible to citizenship an admissible status as a nonquota immigrant when returning from a temporary visit abroad. Sec. 13(c) was repealed by the 1952 Act effective December 24, 1952. In 1955 when appellee departed the United States and sought readmission upon his return, as an immigrant alien ineligible to citizenship he was no longer admissible as a nonquota immigrant, but could only be admitted as a nonimmigrant under Sec. 212(a)(22). He does not seek admission as a nonimmigrant. Appellant contends that appellee as an immigrant alien ineligible to citizenship has no status under the repealed statute which could be saved by Sec. 405(a).



**ARGUMENT.**

Appellee is an immigrant alien. He had been lawfully admitted to the United States as a permanent resident in 1949. In March of 1951 he made application for and was relieved from service in the Armed Forces of the United States on the ground of alienage. Under Sec. 4(a) of the Selective Service Act of 1948 and Sec. 315 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1426, he thereby became permanently ineligible for citizenship. Appellee has advanced no objection to the irregularity of his application for and the granting of exemption from military service. The court below therefore properly found that "he is an alien ineligible for citizenship." (Tr. p. 10.)

Under Sec. 4(b) of the Immigration Act of 1924 an immigrant alien previously lawfully admitted to the United States returning from a temporary visit abroad is included within the meaning of the term "nonquota immigrant." Under Sec. 13(c) of the 1924 Act, an immigrant alien ineligible to citizenship could be admitted if "admissible as a nonquota immigrant."

Under Sec. 212(a)(22) of the 1952 Act, an alien ineligible for citizenship is only admissible as a "non-immigrant."

The court below found (Tr. p. 9):

"It is conceded that petitioner, as a returning alien, previously admitted for permanent residence, has a status of an immigrant alien. Immigration and Nationality Act of 1952, Sec. 101(15), 8 U.S.C. 1101 (15)."

Section 4 and Section 13 of the 1924 Act were repealed by the 1952 Immigration and Nationality Act (Sec. 403). As an immigrant alien ineligible to citizenship, appellee can only be admitted to the United States as a "nonimmigrant" under Sec. 212(a)(22) of the 1952 Act.

The appellee contended to the court below that he is not excludable under Sec. 212 of the 1952 Act "as an immigrant alien ineligible for citizenship, because the Savings Clause of that Act, Sec. 405, preserves the nonexcludable status he had under the prior law." (Tr. p. 10). In reaching the conclusion that appellee did have a nonexcludable status preserved by the Savings Clause, the court below reasoned as follows:

"Thus under the statute in force prior to the 1952 Act, petitioner had a status as a resident alien enabling him to depart the United States on temporary visits abroad and return, even though he was ineligible for citizenship."

There is nothing in the immigration and nationality statutes in effect *prior* to 1952 establishing a status in a resident alien ineligible to citizenship permitting him to depart the United States on visits abroad and to reenter as of course upon return. A resident alien, who had departed from the United States, became an immigrant alien when he sought to reenter the United States to resume his residence. If he had been previously lawfully admitted to the United States and was returning from a temporary visit, he was classified as a nonquota immigrant under Sec. 4 of the 1924 Act. Under Sec. 13(c) of the 1924 Act,

he was admissible as a nonquota immigrant if he was not otherwise excludable under then existing law.

*Shaughnessy v. U. S. ex rel Mezei*, 345 U. S. 206;

*United States ex rel Volpe v. Smith*, 289 U. S. 422;

*Schoeps v. Carmichael*, 177 F.2d 391.

Under Sec. 101(a)(27)(B) of the 1952 Act, appellee, as an immigrant alien, is within the classification of a nonquota immigrant, but Sec. 13(c) of the 1924 Act having been repealed, he is no longer admissible as a nonquota immigrant. He may only be admitted if he seeks to enter as a nonimmigrant under Sec. 212(a)(22) of the 1952 Act. Appellee does not seek to enter as a nonimmigrant. As a nonquota immigrant alien ineligible to citizenship appellee is subject to the exclusion provision of Sec. 212(a) of the 1952 Act. The effect of the decision of the court below in invoking Sec. 405 of the 1952 Act, the Savings Clause, is not to save to appellee a status, but to continue the effect of Sec. 13(c) of the 1924 Act as permitting a nonquota immigrant alien ineligible to citizenship to be admitted to the United States as a nonquota immigrant, notwithstanding the repeal of Sec. 13(c).

The court below held:

“In my opinion, the Savings Clause of the 1952 Act is sufficiently broad to preserve this status (as a resident alien). I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the court in *Paris v. Shaughnessy*, 138 F. Supp. 361 (S.D.

N.Y. 1956) relied upon by the Government. The Savings Clause is an exceptionally sweeping one designed for a statute which constituted a complete revision of our immigration law. It should be applied, as was obviously intended, to forestall the deprivation of a status gained under prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that the Congress wished to suddenly circumscribe the movement of resident aliens who theretofore had been free to leave the United States temporarily and return."

The fallacy of the opinion is one of substitution of terms. Appellee was found to be an "immigrant alien." The term "resident alien" was substituted for that of "immigrant alien" and a "status as a resident alien" was then attributed to appellee which the court held was saved. Congress clearly acted to deprive an "immigrant alien", ineligible to citizenship, who had previously been admitted to permanent residence, of the privilege of reentering the United States as a "nonquota immigrant" by repealing the statutory authority therefor. No clearer expression of Congressional intent can be suggested.

The power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question.

*United States ex rel. Volpe v. Smith*, 289 U.S. 422;

*Turner v. Williams*, 194 U.S. 279;

*Bugajewitz v. Adams*, 228 U.S. 585;

*Low Wah Suey v. Backus*, 225 U.S. 460.

“For purposes of the immigration laws, moreover, the legal incidents of an alien’s entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws. *E.G. Lem Moon Sing v. U.S.*, 158 U.S. 538, 547-548 (1895); *Polymeris v. Trudell*, 284 U.S. 279 (1932).”

*Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 213.

“Whatever our individual estimate of that policy and the fears on which it rests, respondents right to enter the United States depends on the Congressional will, and courts cannot substitute their judgment for the legislative mandate. *Hari-siades v. Shaughnessy*, 342 U.S. 580, 590-591 (1952).”

*Shaughnessy v. U.S. ex rel. Mezei, supra*, p. 216.

From *Knauff v. Shaughnessy*, 338 U.S. 537, page 542, the following is quoted:

“At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.”

*Nishimura Ekiu v. U.S.*, 142 U.S. 651, 659;

*Fong Yue Ting v. U.S.*, 149 U.S. 698, 711.

and also from page 542 of the *Knauff* case:

“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304; *Fong Yue Ting v. United States*, 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.”

The attention of the Court below was directed by appellant to the fact that Congress had made some provision for a returning immigrant alien. Section 405(a) of the 1952 Act contains the sentence: “When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of the visa.” In 1955, appellee herein had obtained a permit to re-enter the United States. For purposes of entry, a reentry permit is the equivalent of an immigration visa.<sup>2</sup>

*United States ex rel. Polymeris et al. v. Trudell*, 284 U.S. 279;

*Rederiaktiebolaget Nordstjernen v. U.S.*, 61 F. 2d 808 (9th Cir. 1932).

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<sup>2</sup>Incorrectly stated by the court below, inversely. (Tr. p. 12.)

Congress having specifically saved the provision of the law in effect on the date of issuance of an immigration visa, if issued prior to the effective date of the 1952 Act, and if unexpired, must necessarily have intended that the immigrant alien in possession of a reentry permit (immigration visa) issued after the effective date of the 1952 Act is subject to the 1952 Act. The court below recognized this conclusion, but avoided the effect of it by holding (Tr. p. 12):

“But assuming the validity of this conclusion, since the Savings Clause is part of the 1952 Act, the net result still is that the Savings Clause is determinative that petitioner is admissible.”

The identical question was presented to the District Court for the Southern District of New York in *Paris v. Shaughnessy*, 138 F. Supp. 36. Judge Dawson in his opinion reached the opposite conclusion to that of the court below herein. At page 41, Judge Dawson held:

“Therefore, the right of petitioner to enter the United States in 1953 was to be determined by the law existing at the time of that entry; and the law at the time of that entry was that aliens ineligible to citizenship ‘shall be excluded from admission into the United States.’ ”

and on page 42:

“The Savings Clause by its very terms, does not continue a right to enter and reenter the country, irrespective of a change in the law, for it is not one of the categories specifically referred to in the Savings Clause. The language of the Savings Clause clearly indicates that all that is

preserved by that clause are inchoate rights in process of determination or acquisition.”

Judge Goodman in his opinion (Tr. p. 11) referred to the *Paris* case and particularly the last sentence of the immediately preceding quotation by saying:

“In my opinion the Savings Clause of the 1952 Act is sufficiently broad to preserve this status. I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the court in *Paris v. Shaughnessy*, 138 F. Supp. 36 (S.D. N.Y. 1956) relied upon by the Government.”

The *Paris* case has been appealed to the Court of Appeals for the Second Circuit, and appears as *Paris v. Shaughnessy*, No. 24017. Briefs have been filed and argument completed. Appellant is not as yet informed of a decision.

Referring again to the comment of the court below regarding the *Paris* opinion:

“I do not read it (Sec. 405(a)) as being limited to the preservation of inchoate rights in process of acquisition as did the court in *Paris v. Shaughnessy*.”

In the view of appellant herein, any question as to the limitations of Section 405(a) is not reached. Appellee is an immigrant alien seeking to enter the United States. His entry is to be determined under the provision of the 1952 Act. Unless he is in possession of an unexpired immigration visa issued prior to the effective date of the 1952 Act, Sec. 405(a) is not applicable to him.



**CONCLUSION.**

Appellant respectfully submits that the court below erred in granting and issuing the writ of habeas corpus and in discharging appellee from the custody of appellant. The order of the court below issuing the writ and discharging appellee should be reversed, the writ discharged, the petition dismissed and the appellee remanded to the custody of appellant.

Dated, San Francisco, California,

April 5, 1957.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

*Attorneys for Appellant.*



No. 15,394

IN THE

United States Court of Appeals  
For the Ninth Circuit

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BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellant,*

vs.

KURT RIETMANN,

*Appellee.*

On Appeal from the United States District Court for the  
Northern District of California.

BRIEF FOR APPELLEE.

---

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FILED  
JUN 7 1957  
FRED P. CROFT, JR.



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No. 15,394

IN THE

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BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
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*Appellant,*

VS.

KURT RIETMANN,

*Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California.**

**BRIEF FOR APPELLEE.**

---

**STATEMENT OF THE CASE.**

The facts in this case are not in dispute and are clearly stated in the order of the Court below and in appellant's brief. The appellee, a citizen of Switzerland, was admitted to the United States for permanent residence on July 1, 1949. In 1951 he obtained relief from military service in the United States armed forces on the ground of alienage, thereby making himself ineligible for citizenship (8 U.S.C. 1182 (a)(22)).

The sole issue before this Court is whether the “Savings Clause” (Sect. 405(a) of the 1952 Act (8 U.S.C. 1101 footnote) saves to the appellee the right to reenter the United States as a returning resident, notwithstanding ineligibility to citizenship.

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### STATUTES INVOLVED.

Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.):

“Section 101. (a) (8 U.S.C. 1101(19) (27).

(19) The term ‘ineligible to citizenship’, when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

\* \* \* \* \*

(27) The term ‘non quota immigrant’ means—

\* \* \* \* \*

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad; \* \* \*”

“Section 212. (a) (8 U.S.C. 1182 (a))

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to



receive visas and shall be excluded from admission into the United States:

\* \* \* \* \*

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;”

Section 315 of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1426:

“(a) Notwithstanding the provisions of Section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces \* \* \* on the ground that he is an alien, and is or was relieved or discharged from such training on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System \* \* \* shall be conclusive as to whether an alien was relieved \* \* \* from such liability for training or service because he was an alien.”

Section 405(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1101 Footnote:

#### “Savings Clause

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein,

shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa \* \* \*

Section 4 of the Immigration Act of 1924, 8 U.S.C. Sec. 204:

“When used in this Act the term “nonquota immigrant” means—

\* \* \* (b) an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad; \* \* \*

Section 13(c) of the Immigration Act of 1924, 8 U.S.C. Sec. 213(c):

“No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant \* \* \*.”

Section 3(a) of the Selective Training and Service Act of 1940, 55 Stat. 844, 845:

“Except as otherwise provided in this Act, every male citizen of the United States and every other male person residing in the United States, who is between the ages of twenty and forty-five \* \* \* shall be liable for training and service in the land and naval forces of the United States: *provided*, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application “to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States \* \* \*.”

Section 4(a) of the Selective Service Act of 1948, 62 Stat. 604-606:

“(a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to Section 3 of this title, shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferrable

or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. \* \* \*

---

### **SUMMARY OF ARGUMENT.**

Section 13(c) of the 1924 Act, (8 U.S.C. 213(c)) which was in effect until December 1952, permitted aliens ineligible to citizenship who were permanent residents of the United States to depart and reenter (if otherwise admissible), notwithstanding such ineligibility to citizenship. The appellee had such a non-excludable status so far as ineligibility to citizenship was concerned. This status was preserved to him by the "Savings Clause," Sec. 405(a) of the Immigration and Nationality Act of 1952, and he was therefore entitled to readmission to the United States upon his return in 1955.

---

### **ARGUMENT.**

The appellee was admitted to the United States in 1949 as a permanent resident. In 1951, he made application for, and was released from, service in the armed

forces on the ground of alienage. He thereby became ineligible to citizenship. An immigrant, previously lawfully admitted to the United States, returning to the United States after a temporary visit abroad, is classified as a nonquota immigrant (Section 4(b), Act of 1924). A nonquota immigrant could be admitted to the United States, notwithstanding ineligibility to citizenship under the provisions of Section 13(c) of the Immigration Act of 1924.

Stated differently, a permanent resident alien who made a temporary trip abroad could be readmitted to the United States on his return, if otherwise admissible, notwithstanding the fact that he was ineligible to citizenship. He had a non-excludable status so far as eligibility to citizenship was concerned. The 1952 Act does not specifically provide such a non-excludable status. To this extent, we agree with the appellant. The Court below found that this *non-excludable status* was preserved to the alien after the 1952 Act by the provisions of the "Savings Clause" (Sec. 405(a)). This finding of the Court below is the sole issue before this Court.

Appellant, however, has digressed from this issue, apparently through failure to properly interpret the rationale of the decision of the District Court. Appellant quotes the District Court decision as follows:

"In my opinion, the Savings Clause of the 1952 Act is sufficiently broad to preserve this status (as a resident alien). I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the court in

*Paris v. Shaughnessy*, 138 F. Supp. 361 (S.D.N.Y. 1956) relied upon by the Government. The Savings Clause is an exceptionally sweeping one designed for a statute which constituted a complete revision of our immigration law. It should be applied, as was obviously intended, to forestall the deprivation of a status gained under prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that the Congress wished to suddenly circumscribe the movement of resident aliens who theretofore had been free to leave the United States temporarily and return."

The appellant, in quoting the well-chosen words of the Court below, supplied the following words "(as a resident alien)." Judge Goodman was *not* referring to the status as a resident alien in the quoted paragraph, but was referring to the *non-excludable status* of the appellee. Appellant states:

"The effect of the decision of the court below in invoking Sec. 405 of the 1952 Act, the Savings Clause, is not to save to appellee a status, but to continue the effect of Sec. 13(c) of the 1924 Act as permitting a nonquota immigrant alien ineligible to citizenship to be admitted to the United States as a nonquota immigrant, notwithstanding the repeal of Sec. 13(c)."

It is true that the "Savings Clause" does continue the effect of Section 13(c) so far as such non-excludability status is concerned. Appellant, however, having supplied his own incorrect interpretation as to the status referred to by the District Court, states:

“The fallacy of the opinion is one of substitution of terms. Appellee was found to be an ‘immigrant alien.’ The term ‘resident alien’ was substituted for that of ‘immigrant alien’ and a ‘status as a resident alien’ was then attributed to appellee which the court held was saved. Congress clearly acted to deprive an ‘immigrant alien’, ineligible to citizenship, who had previously been admitted to permanent residence, of the privilege of reentering the United States as a ‘nonquota immigrant’ by repealing the statutory authority therefor. No clearer expression of Congressional intent can be suggested.”

Appellant disregards the Supreme Court decisions hereinafter discussed, holding that, in the absence of any specific statutory provision, a status under the prior Act is preserved. There is no specific statutory provision in the 1952 Act which would deprive the appellee of his non-excludable status. In fact, the only authority for the exclusion of aliens under the 1952 Act lies in Section 212 which reads in part:

*“Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:”* (Emphasis ours)

Appellant contends the mere failure to include in the 1952 Act an exception for returning resident aliens ineligible to citizenship constitutes an intent to terminate the non-excludable status acquired under the prior statute. Obviously, Congress had no such intention. We submit that Congress was merely preventing aliens from acquiring such non-excludable status by

actions after the effective date of the 1952 Act, and there was no intent, expressed or implied, to deprive aliens of such a non-excludable status acquired under the prior laws.

Concededly, if the “Savings Clause” does not apply, the appellee was properly excluded, but we believe that the language of the statute and the decisions of the Courts relating to the “Savings Clause” overwhelmingly support the decision of the Court below.

In *United States v. Menasche*, 348 US 528, the Court stated:

“The whole development of this Savings Clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy *not to strip aliens of advantages gained under prior laws*. The consistent broadening of the savings provision, particularly in its general terminology, indicates that *this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress*.” (Emphasis ours)

*Shomberg v. United States*, (348 US 540).

likewise holds that the “Savings Clause” is all-inclusive, and that, where Congress intended to override the “Savings Clause” because it deemed other considerations more compelling than the preservation of the status quo, it plainly said so in the Act. In footnote 5 of that decision, the Court cites four examples of such exceptions. In the case at bar, there is no such specific exception that would take away plaintiff’s pre-



existing right granted by statute, to reenter the United States, notwithstanding ineligibility to citizenship, if otherwise admissible.

As pointed out above, the "Savings Clause" is found in Section 405 of the McCarran Act. Both the *Menasche* and the *Shomberg* cases involved subdivision "b" of the "Savings Clause," which deals with naturalization proceedings, whereas, the case at bar involves subdivision "a", which deals with all other situations. However, the interpretation of the "Savings Clause" found in the cases apply to both subdivisions "a" and "b" with equal force.

*United States ex rel. Sciria v. Lehmann*, 136 F.

Supp. 458,

and the later case of

*United States ex rel. Carson v. Kershner*, 228

F. 2d 142,

discussed the *Menasche* and *Shomberg* cases as they bear on different situations. The conclusion reached is summed up in the following language of the *Carson* case, at page 146:

"The Court found that the relevant savings clause in that case was the one contained in Section 405(b). That Section, like Section 405(a), consists of a general savings provision which applies unless 'otherwise specifically provided.' "

\* \* \* \* \*

"The *Menasche* and the *Shomberg* opinions thus clearly teach that the savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. *It was held*

*in the Shomberg case that such intent is clear where it is specifically provided that a provision shall be effective 'notwithstanding' the terms of the savings clause. No such clear manifestation of intent is apparent in the present case."* (Emphasis ours)

We repeat, no such Congressional intent exists in the case at bar.

An additional point in the *Carson* case (at p. 147) deserves mention:

"Moreover, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan v. Phelan*, 1948, 33 US 6, 10, 68 S. Ct. 374, 92 L. Ed. 433."

The same view is expressed a little differently by this Court in the case of *Aure v. United States*, 225 F. 2d 88, at page 90, as follows:

"Clearly, it is the teaching of the *Menasche* case and we are satisfied it was the intent of Congress that the savings clause is not limited to cases involving affirmative action and those concerning derivative citizenship, but its preservation feature should be extended to all substantive rights existing at the time the statute creating the rights was repealed. The real test is whether the 'right' which the alien seeks to have preserved by the savings clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies."

In the instant case it is pointed out that the appellee's right of reentry is not merely a procedural remedy; it was a substantive right.

Appellant has cited *Paris v. Shaughnessy*, 138 F. Supp. 36. With respect to the District Court's decision in the *Paris* case that only "inchoate rights in the process of termination or acquisition" are saved, attention is invited to the case of

*Wong Kay Suey v. Brownell*, 227 F. 2d 41, in which the Court declared (at p. 42):

"It may be said that the only 'rights' directly referred to in the savings clause are rights 'in the process of acquisition.' But we think this phrase was intended to have a broadening rather than a narrowing effect. Congress can hardly have intended to preserve *only* rights 'in the process of acquisition' and cut off rights 'fully acquired'."

The following cases illustrate some of the situations in which the courts have held that a status of non-deportability under prior law is preserved by the savings clause:

*United States ex rel. De Luca v. O'Rourke*, 213 F. 2d 759,

held that a non-deportable status gained by *judicial recommendation against deportation* after a narcotics conviction was saved, even though the new Immigration Act makes no provision for such recommendation.

*Ex parte Robles-Rubio*, 119 F. Supp. 610, made the same decision, the Court saying at page 613:

"The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act

would inevitably have unforeseen effects upon pre-existing statuses and conditions, and the Congressional desire to avoid such effects insofar as possible.

*United States ex rel. Sciria v. Lehmann*, 139

F. Supp. 458,

held that immunity from deportation gained by a *statute of limitations* was preserved, despite a provision of the new Act which seemed to remove the immunity.

*United States ex rel. Carson v. Kershner*, 228

F. 2d 142,

held that immunity from deportation by a *conditional pardon* was saved.

And the Attorney General has held in a recent Interim Decision (*Matter of J—*, A9 689, 703, Int. Dec. 753, decided February 16, 1956) that an alien who was deportable because he had reentered the United States illegally after a prior deportation, acquired a non-deportable status by a *private bill* enacted by Congress in 1949 and that such status was preserved by the savings clause. The Attorney General rested his decision on the *Menasche* case.

The same principle that governed the foregoing cases should be applicable here. The only essential difference between the cited cases and the case at bar relates to the manner in which the status of non-deportability or non-excludability was acquired. In the cited cases it was acquired by a variety of methods—judicial, statute of limitations, pardon, private bill—

and in the case at bar, it was acquired by legislative enactment; that is, Section 13(c) of the 1924 Act.

In view of the express provisions of the "Savings Clause" that repealed statutes be continued in full force and effect, no reason exists to distinguish this case from the others. As the Court below said, the "Savings Clause" should be applied as was intended—to forestall deprivation of status gained under prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that Congress wished to suddenly circumscribe the movements of resident aliens who heretofore had been free to leave the United States temporarily and return.

We agree with appellant that Congress has the power to prescribe terms and conditions upon which aliens may enter or remain in the United States, and we believe that in the enactment of Section 405(a) of the Immigration Act of 1952, Congress exercised that power to preserve, among other things, a non-excludable status which existed prior to the 1952 Act, in the same manner that the various non-deportable statutes involved in the above cited cases were saved.

The court below indicated the fallacy of the decision of the District Court in *Paris v. Shaughnessy*, 138 F. Supp. 36, cited by appellant, stating:

"In my opinion, the savings clause of the 1952 Act is sufficiently broad to preserve this status. I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the Court in *Paris v. Shaughnessy*, 138 F. Supp. 36 (S.D.N.Y. 1956), relied upon the Gov-

ernment. The savings clause is an exceptionally sweeping one designed for a statute which constituted a complete revision of our immigration law. It should be applied, as was obviously intended, to forestall the deprivation of a status gained under the prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that the Congress wished to suddenly circumscribe the movements of resident aliens who theretofore had been free to leave the United States temporarily and return."

Appellant contends that appellee, as an immigrant seeking admission to the United States, had no rights or status by reason of his prior residence in the United States, and that, to be admitted, he must meet all the requirements of the statutes in effect at the time of his application for admission. We agree that he must meet the requirements of the statutes in effect at the time of his application for admission, but we would point out, as did the Court below, that the "Savings Clause" (Section 405) is a part of the statute which was in effect at the time of appellee's application for admission, and the excluding provision of the statute (Section 212(a)) states:

"Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:"

Furthermore, the fact that the present and prior statutes provide for reentry permits in lieu of immigrant visas for alien permanent residents returning from temporary visits abroad indicates that such

aliens are not treated exactly the same as aliens who have never had a residence in the United States. The decision of the Supreme Court in *Kwong Hai Shew v. Colding*, 344 US 590, makes it abundantly clear that a resident alien returning from a temporary trip outside the United States has a status different from that of an alien who has never been in the United States before. This decision has been followed by the lower courts and by the Board of Immigration Appeals in subsequent cases.

*Roggenbuhl v. Lusby*, 116 Fed. Supp. 315;

*In Matter of B—*, A9 552, 318 V I.&N. Dec. 712.

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### CONCLUSION.

We respectfully submit that the Court below correctly applied the law in holding that the appellee had a non-excludable status under Section 13(c) of the Immigration Act of 1924 which was saved to him by the provisions of Section 405(a) of the Immigration Act of 1952, and that the order of the Court below should be affirmed.

Dated, San Francisco, California,

June 5, 1957.

ARTHUR J. PHELAN,

MILTON T. SIMMONS,

*Attorneys for Appellee.*





No. 15,394

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellant,*

VS.

KURT RIETMANN,

*Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California.**

**APPELLANT'S REPLY BRIEF.**

---

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FILED

AUG 20 1957

PAUL P O'BRIEN, CL



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No. 15,394

IN THE

**United States Court of Appeals  
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BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
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*Appellant,*

vs.

KURT RIETMANN,

*Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California.**

**APPELLANT'S REPLY BRIEF.**

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Since the filing of appellee's brief, two cases having important bearing upon this appeal have been considered and decided by appellate courts:

*Lehmann v. U. S. ex rel. Carson*, by the Supreme Court, 353 U.S. 685;

*Paris v. Shaughnessy*, by the Court of Appeals for the Second Circuit, decided July 2, 1957,  
..... F.2d .....

Appellant in his opening brief has called the Court's attention to the provisions of Section

212(a)(22) of the 1952 Immigration and Nationality Act, wherein Congress provided that aliens who are ineligible to citizenship, except aliens seeking to enter as *non-immigrants*, shall be excluded from admission into the United States. The previous existing Section 13(c) of the 1924 Act, which permitted such alien ineligible to citizenship to be admitted as a *non-quota* immigrant was thus *specifically* changed. Appellee in his reply contends that Section 405(a) saves to him "a status as resident alien enabling him to depart the United States on temporary business abroad and return even though he was ineligible to citizenship." Appellee concedes that the 1952 Act does not specifically provide such non-excludable status. (Brief, p. 7.) It is his contention that it was necessary for Congress to have specifically provided that the provisions of Section 212(a)(2) shall be effective "notwithstanding" the terms of the savings clause in order to take such provision outside the terms of the savings clause. Appellee cited *United States ex rel. Carson v. Kershner*, 228 F.2d 142, in support of his contention and particularly italicized the following quotation: "It was held in the Shomberg case that such intent is clear where it is specifically provided that a provision shall be effective 'notwithstanding' the terms of the savings clause." The Supreme Court granted certiorari in *Lehmann v. U. S. ex rel. Carson*, 353 U.S. 915, and on June 3, 1957 held the Court of Appeals in error and reversed its judgment, 353 U.S. 685.

The following paragraph is quoted from page 689 of the opinion of the Court:

“Thus, even if we assume that respondent has a ‘status’ within the meaning of Section 405(a), that section by its own terms does not apply to situations ‘otherwise specifically provided’ for in the Act. Section 241(a)(1) specifically provides for the deportation of an alien who ‘at the time of entry was . . . excludable by the law existing at [that] time,’ and Section 241(a)(4) specifically provides for the deportation of an alien who ‘at any time after entry’ has been convicted of two crimes involving moral turpitude. And Section 241(d) makes Sections 241(a)(1) and 241(a)(4) applicable to all aliens covered thereby, ‘notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.’ It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved. This case is, therefore, ‘otherwise specifically provided’ for within the meaning of Section 405(a). The Court of Appeals was in error in holding to the contrary, and its judgment is reversed.”

The case of *Paris v. Shaughnessy*, 138 F. Supp. 36, has been cited to the Court as reaching a decision contrary to the decision of the District Court below herein. On July 2, 1957, the Court of Appeals for the Second Circuit, in *Paris v. Shaughnessy*, No. 137, October term 1956, Docket No. 24017, ..... F.2d ....., affirmed the judgment of the District Court. Paris, similarly to appellee herein, had voluntarily made application to be relieved from liability from training

and service in the Armed Forces and in so doing debarred himself from becoming a citizen of the United States. Prior to the effective date of the Immigration and Nationality Act of 1952, he could depart from the United States as a visitor abroad and reenter legally. *Paris* last departed the United States on August 15, 1953. When he entered the United States on September 15, 1953, the Immigration and Nationality Act of 1952 was in effect. Under Section 212(a)(22), he was an excludable alien. His contention was that the provisions of Section 405(a), the savings clause of the 1952 Act, applied to him and that Section 212(a)(22) was therefore inapplicable. The Court held:

“But *Paris* misreads Section 405(a). His pre-existing status of non-deportability would have remained unchanged unless the 1952 Act otherwise specifically provided. Section 212(a)(22) of that Act does so otherwise specifically provide. Cf. *Lehmann v. U.S. ex rel. Carson*, decided June 3, 1957, 353 U.S. 685. *Mulcahey v. Catalanotte*, decided June 3, 1957, 353 U.S. 692.”

It is respectfully submitted that the Court below is in error and its judgment should be reversed.

Dated, San Francisco, California,

August 15, 1957.

LLOYD H. BURKE,

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*Attorneys for Appellant.*



No. 15397

---

United States  
Court of Appeals  
for the Ninth Circuit

---

MILFORD R. BAUMGARDNER and PEARL E.  
BAUMGARDNER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

---

Transcript of Record

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Petition to Review a Decision of the Tax Court  
of the United States

FILED

MAR 19 1957

PAUL P. O'BRIEN, CLERK



No. 15397

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United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 49897

MILFORD R. BAUMGARDNER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1953

July 31—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 3—Copy of petition served on General Counsel.

Sept. 15—Answer filed by General Counsel.

Sept. 15—Request for hearing in Los Angeles, filed by General Counsel.

Sept. 18—Notice issued placing proceeding on Los Angeles Calendar. Service of answer and request made.

Nov. 2—Reply to answer filed by taxpayer. Copy served.

1954

Aug. 10—Hearing set Dec. 6, 1954, Los Angeles, California.

Oct. 26—Notice canceling the hearing.

1955

Jan. 10—Hearing set March 21, 1955, Los Angeles, California.

## Docket Entries—(Continued)

1955

- Feb. 16—Motion for a continuance, filed by General Counsel.
- Feb. 18—Hearing set 3/9/55, Washington, D. C., on respondent's above motion.
- Mar. 9—Hearing had before Judge Kern on respondent's motion for continuance. Granted.
- Mar. 9—Order that respondent's motion is granted and case is stricken from the Los Angeles calendar of 3/21/55 and continued to the 7/5/55 Los Angeles calendar, entered.
- Mar. 25—Hearing set 7/5/55, Los Angeles, California.
- Apr. 18—Notice hearing date changed to 6/20/55, Los Angeles.
- June 21—Hearing had before Judge Black on petitioner's oral motion to consolidate dockets 49897, 49898 and 49899, granted; and on Court's own motion to continue. Continued to next term.
- June 21—Order that case is continued to next term in Los Angeles, California, entered.
- July 13—Transcript of hearing 6/21/55 filed.
- Aug. 4—Hearing set November 28, 1955, Los Angeles.
- Nov. 29, 30,
- Dec. 1—Hearing had before Judge Tietjens on the merits, on respondent's motion to amend answer, granted. Stipulation of facts, motion to amend and amendments to answer, filed at hearing. Served. Briefs 60 days from 12/1/55, 30 days thereafter, replies.

## Docket Entries—(Continued)

1955

Dec. 12—Transcript of hearing 11/29/55 filed.

Dec. 12—Transcript of hearing 11/30/55 filed.

Dec. 12—Transcript of hearing 12/1/55 filed.

1956

Jan. 27—Motion for extension to February 29, 1956, to file brief, filed by respondent. 1/30/56 granted.

Feb. 24—Brief filed by taxpayer. 3/12/56 copy served.

Feb. 28—Motion for extension to March 7, 1956, to file brief, filed by respondent. 2/29/56 granted.

Mar. 7—Respondent's brief filed. 3/8/56 copy served.

May 9—Memorandum findings of fact and opinion filed, Tietjens, J. Decision will be entered under Rule 50. Served 5/9/56.

Aug. 28—Agreed computation filed.

Aug. 29—Decision entered. Tietjens, J. Division 1. Served 8/30/56.

Nov. 19—Petition for review by United States Court of Appeals, Ninth Circuit, filed by petitioner.

Nov. 19—Statement of Points filed.

Nov. 19—Designation of contents of record on review filed.

Nov. 20—Proof of service of petition for review, statement of points and designation filed.

The Tax Court of the United States

Docket No. 49899

MILFORD R. BAUMGARDNER and PEARL E.  
BAUMGARDNER, Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES

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Docket Entries—(Continued)

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- July 13—Transcript of hearing 6/21/55 filed.
- Aug. 4—Hearing set November 28, 1955, Los Angeles.
- Nov. 29, 30—Hearing had before Judge Tietjens on the merits.

## Docket Entries—(Continued)

1955

- Dec. 1—Stipulation of facts, filed at hearing.  
Briefs 60 days from 12/1/55 and replies  
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- Dec. 12—Transcript of hearing 11/30/55 filed.
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The Tax Court of the United States

Docket No. 49897

MILFORD R. BAUMGARDNER,

Petitioner,

vs.

DIRECTOR OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Director of Internal Revenue in his Notice of deficiency (Symbols A:R:90D:LHP) dated May 11th, 1953, and as a basis of his proceeding alleges as follows:

(1) That petitioner is an individual residing at 406 West 131st Street, Hawthorne, California. The returns for the period here involved were filed with the Collector for the 6th Collection District of California.

(2) The notice of deficiency was mailed to the petitioner on May 11, 1953; a copy of the deficiency notice and so much of the statement contained therein as is material is attached hereto and marked Exhibit "A."

(3) The taxes in controversy are income taxes for the calendar years 1945 and 1947 in the aggregate amount of \$1,832.16, and penalty in the amount of \$1,030.96.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining petitioner realized a long-term capital gain in 1945 in the amount of \$2,679.52 from the sale of a residence in lieu of \$1,128.50 which was reported in petitioner's income tax return.

(b) Respondent erred in including in petitioner's return for the year 1945 other income in the amount of \$3,889.56.

(c) Respondent erred in including in petitioner's income for the year 1947 other income in the sum of \$3,370.78.

(d) Respondent erred in proposing to assess penalties for each of the years involved under the provisions of Section 293(b) and Section 294(d)(2) of the Internal Revenue Code.

(e) Respondent erred in proposing for assessment any deficiencies for either of the years involved for the reason that the same are now barred by the provisions of Section 275 of the Internal Revenue Code.

(5) The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner realized in 1945 a long-term capital gain on the sale of a residence in the amount of \$1,128.50 and no more, which amount was reported.

This was community income and petitioner reported his one-half thereof in his return for that year.

(b) Petitioner did not receive in the year 1945 other income in the amount of \$3,889.56, or in any other amount, which was not reported in his return.

(c) Petitioner did not receive income in 1947 in the amount of \$3,370.78, or any other amount, which was not reported in his return.

(d) Petitioner's returns for each of the years in question were true and correct at the time he filed them to the best of his knowledge and belief. These returns were not filed with the intent to defeat or evade any tax liability legally due; petitioner did not substantially underestimate his tax for either of the years under declarations which he filed.

(e) Petitioner filed his Federal income tax return for the year 1945 on or about March 15, 1946, and filed his Federal income tax return for the year 1947 on or about March 15, 1948.

Wherefore, petitioner prays that the Court may hear this petition and determine:

(1) That there are no deficiencies in income taxes for either of the years involved; and

(2) That there are no penalties due and owing under the provisions of Sections 293 and 294 of the Internal Revenue Code.

/s/ GEORGE BOUCHARD,  
Counsel for Petitioner.

Duly verified.

## EXHIBIT A

Form 1234

U. S. Treasury Department  
Office of the Director of Internal Revenue  
Head, Audit Division  
417 South Hill Street  
Los Angeles 13, California

In replying Refer to:

A:R:90D:LHP

May 11, 1953.

Mr. Milford R. Baumgardner,  
406 West 131st Street,  
Hawthorne, California.

Dear Mr. Baumgardner:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1945 and December 31, 1947, discloses a deficiency of \$1,832.16 and \$1,030.96 in penalties, as shown in the statement attached. Assessment of such deficiency or deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments.

In accordance with the provisions of existing internal revenue laws notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the

deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Very truly yours,

T. COLEMAN ANDREWS,  
Commissioner,

By /s/ R. A. RIDDELL,  
Director.

Enclosures:

Statement  
Form 1276

Statement

A :R :90D :LHP

Mr. Milford R. Baumgardner  
406 West 131st Street  
Hawthorne, California

Tax Liability for the Taxable Years Ended December 31,  
1945, and December 31, 1947

#### Summary of Deficiencies

Year	Deficiency	Penalties	
		Sec. 233(b)	Sec. 294(d)(2)
1945 Income tax.....	\$1,146.97	\$573.49	\$ 73.38
1947 Income tax.....	685.19	342.59	41.50
	<hr/>	<hr/>	<hr/>
	\$1,832.16	\$916.08	\$114.88

Summary of assessments made under the provisions of Internal Revenue laws applicable to jeopardy assessments on April 2, 1953, for the taxable years ended December 31, 1945, and December 31, 1947.

Year	Deficiency	Penalties		Interest to 4-2-53
		Sec. 293(b)	Sec. 294(d) (2)	
1945 Income tax.....	\$1,146.97	\$573.49	\$ 73.38	\$485.12
1947 Income tax.....	685.19	342.59	41.50	207.58
Totals.....	\$1,832.16	\$916.08	\$114.88	\$692.70

This determination of your income tax and penalty liability has been made upon the basis of information on file in this office.

The above-mentioned penalties have been asserted in accordance with the provisions of the sections of the Internal Revenue Code shown above.

It has been determined that during the calendar years 1945 and 1947 taxable community income was received by you and your wife, Pearl E. Baumgardner, in the amounts shown below which you failed to report in your income tax returns for the years mentioned:

Year	Amount Received	Your Community ½ of Amount Received
1945 .....	\$ 7,779.12	\$3,889.56
1947 .....	6,741.56	3,370.78
Totals.....	\$14,520.68	\$7,260.34

Your income for the calendar years 1945 and 1947 is increased herein by your community share of the above-mentioned amounts of unreported income.

#### Adjustments to Income Taxable Year Ended December 31, 1945

Adjusted gross income as disclosed by return .....	\$2,372.75
Additional income:	
(a) Long-term capital gain increased..\$ 775.51	
(b) Other income unreported.....	3,889.56
Adjusted gross income as corrected.....	\$7,037.82
Allowable deduction:	
(c) Standard deduction .....	500.00
Net income as determined.....	\$6,537.82



Explanation of Adjustments

(a) It has been determined that you realized a long-term capital gain of \$2,679.52 from the sale of a residence during this taxable year, in lieu of \$1,128.50, the amount reported in your return, an increase of \$1,551.02, your community half of which is \$775.51.

(b) This adjustment has been previously explained.

(c) The standard deduction of \$500.00 is allowed under the provisions of section 23(aa) of the Internal Revenue Code.

Computation of Tax

Taxable Year Ended December 31, 1945

Net income as determined.....	\$6,537.82	
Less: Surtax exemptions.....	1,000.00	
	<hr/>	
Surtax net income.....	\$5,537.82	
Surtax .....		\$1,239.83
Net income as determined.....	\$6,537.82	
Less: Normal tax exemption.....	500.00	
	<hr/>	
Net income subject to normal tax.....	\$6,037.82	
Normal tax at 3%.....		181.14
		<hr/>
Correct income tax liability.....		\$1,420.97
Income tax liability shown on return.....		274.00
		<hr/>
Deficiency of income tax.....		\$1,146.97
Penalty—Sec. 293(b), I.R.C. ....		\$ 573.49
Penalty—Sec. 294(d)(2), I.R.C. ....		\$ 73.38

Adjustments to Income

Taxable Year Ended December 31, 1947

Adjusted gross income as disclosed by return.....	\$2,955.91
Additional income:	
(a) Other income unreported.....	3,370.78
	<hr/>
Adjusted gross income as corrected.....	\$6,326.69
Allowable deduction:	
(b) Standard deduction .....	500.00
	<hr/>
Net income as determined.....	\$5,826.69

## Explanation of Adjustments

- (a) This adjustment has been previously explained.  
 (b) The standard deduction of \$500.00 is allowed under the provisions of section 23(aa) of the Internal Revenue Code.

## Computation of Tax

Taxable Year Ended December 31, 1947

Net income as determined.....	\$5,826.69
Less: Exemptions .....	1,000.00
	<hr/>
Balance, subject to surtax and normal tax	\$4,826.69
Tentative tax on \$4,826.69.....	\$1,054.94
Less 5% .....	52.75
	<hr/>
Correct income tax liability.....	\$1,002.19
Income tax liability shown on return, account No. 2191601.....	317.00
	<hr/>
Deficiency of income tax.....	\$ 685.19
Penalty—Sec. 293(b), I.R.C. ....	\$ 342.59
Penalty—Sec. 294(d) (2), I.R.C. ....	\$ 41.50

Received and Filed July 31, 1953, T.C.U.S.

Served August 3, 1953.

The Tax Court of the United States  
Docket No. 49899

MILFORD R. BAUMGARDNER and PEARL E.  
BAUMGARDNER, Husband and Wife,  
Petitioners,

vs.

DIRECTOR OF INTERNAL REVENUE,  
Respondent.

## PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the

Director of Internal Revenue in his Notice of Deficiency (Symbols A:R:90D:LHP) dated May 11, 1953, and as a basis of their proceeding allege as follows:

(1) That petitioners are husband and wife and reside at 406 West 131st Street, Hawthorne, California. The returns for the period here involved were filed with the Collector for the 6th Collection District of California.

(2) The notice of deficiency was mailed to the petitioners on May 11, 1953; a copy of the deficiency notice and so much of the statement contained therein as is material is attached hereto and marked Exhibit "A."

(3) The taxes in controversy are income taxes for the calendar years 1942, 1944, 1946, 1948, 1949, 1950 and 1951 in the aggregate amount of \$14,499.61 and penalty in the amount of \$9,568.43.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in increasing petitioners' income for the year 1942 in the amount of \$3,190.26.

(b) Respondent erred in adding to petitioners' income for the year 1944 the sum of \$115.03 alleged to represent income received and not reported in their return.

(c) Respondent erred in determining that petitioners realized a long-term capital gain during the

year 1944 in the sum of \$4,103.98 instead of \$545.00 reported in their return.

(d) Respondent erred in increasing petitioners' income for the year 1946 in the amount of \$8,071.16.

(e) Respondent erred in increasing petitioners' income for the year 1948 in the amount of \$15,273.16.

(f) Respondent erred in increasing petitioners' income for the year 1949 in the amount of \$705.11 alleged to represent income received and not reported in their return.

(g) Respondent erred in adding to income of petitioners for the year 1949 the sum of \$723.55 alleged to represent rental income received and not reported.

(h) Respondent erred in increasing petitioners' income for the year 1950 in the amount of \$22,065.94.

(i) Respondent erred in increasing the income of petitioners for the year 1951 by the amount of \$6,566.77.

(j) Respondent erred in proposing for assessment penalties for each of the years in question under the provisions of Section 293(b) of the Internal Revenue Code.

(k) Respondent erred in proposing for assessment penalties for the years 1946, 1948, 1949, 1950 and 1951 under the provisions of Sections 294(d)-(1)(a) and 294(d)(2) of the Internal Revenue Code.

(1) Respondent erred in proposing for assessment additional income taxes for the years 1942, 1944, 1946, 1948 and 1949 for the reason that such assessment is now barred by the provisions of Section 275 of the Internal Revenue Code.

(5) The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) Petitioners did not receive income in the year 1942 in the amount of \$3,190.26, or in any other sum, which was not reported in their return for that year.

(b) Petitioners did not receive in the year 1944 interest income in the amount of \$115.03, or in any other sum, which was not reported on their return.

(c) Petitioners did not realize a long-term capital gain of \$4,103.98 from the sale of property in 1944, but realized only the sum of \$545.00, which was reported in their return.

(d) Petitioners did not receive in the year 1946 income in the amount of \$8,071.16, or in any other amount, which was not reported in their return for that year.

(e) Petitioners did not receive income in the year 1948 in the amount of \$15,273.16, or in any other amount, which was not reported in their return.

(f) Petitioners did not receive interest income in the year 1949 in the amount of \$705.11, or in any other amount, which was not reported in their return.

(g) Petitioners did not receive in the year 1949 net rental income in the amount of \$723.55, or in any other amount, which was not reported in their return.

(h) Petitioners did not receive during the year 1950 income in the amount of \$22,065.94, or in any other amount which was not reported in their return.

(i) Petitioners did not receive during the year 1951 income in the amount of \$6,566.77, or in any other amount, which was not reported in their return.

(j) Petitioners' returns for each of the years in question were filed in good faith and were to the best of their knowledge and belief true and correct. They were not filed for the purpose of forfeiting or evading any tax legally due.

(k) Petitioners did not fail to file a Declaration of Estimated Tax within the period prescribed by law and did not substantially underestimate the estimated tax due.

(l) Petitioners filed their Federal income tax return for the year 1942 on or about March 15, 1943;

Petitioners filed their Federal income tax return for the year 1944 on or about March 15, 1945;

Petitioners filed their Federal income tax return for the year 1946 on or about March 15, 1947;

Petitioners filed their Federal income tax return for the year 1948 on or about March 15, 1949; and

Petitioners filed their Federal income tax return for the year 1949 on or about March 15, 1950.

Wherefore, petitioners pray that the Court may hear this petition and determine:

(1) That there are no deficiencies in income taxes for any of the years involved; and

(2) That there are no penalties due and owing under the provisions of Sections 293 and 294 of the Internal Revenue Code.

/s/ GEORGE BOUCHARD,  
Counsel for Petitioners.

Duly verified.

EXHIBIT A

Form 1234

U. S. Treasury Department  
Office of the Director of Internal Revenue  
Head, Audit Division  
417 South Hill Street  
Los Angeles 13, California

In Replying Refer to:

A:R:90D:LHP

May 11, 1953.

Mr. Milford R. Baumgardner and  
Mrs. Pearl E. Baumgardner  
Husband and Wife,  
406 West 131st Street,  
Hawthorne, California.

Dear Mr. and Mrs. Baumgardner:

You are advised that the determination of your income tax liability for the taxable years ended De-

ember 31, 1942, 1944, 1946, 1948, 1949, 1950 and 1951 disclose a deficiency of \$14,499.61 and \$9,568.43 in penalties, as shown in the statement attached. Assessment of such deficiency or deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments.

In accordance with the provisions of existing internal revenue laws notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Very truly yours,

T. COLEMAN ANDREWS,  
Commissioner,

By /s/ R. A. RIDDELL,  
Director.

Enclosures:

Statement  
Form 1276



## Statement

A:R:90D:LHP

Mr. Milford R. Baumgardner and  
 Mrs. Pearl E. Baumgardner  
 Husband and Wife  
 406 West 131st Street  
 Hawthorne, California

Tax Liability for the Taxable Years Ended December 31, 1942,  
 December 31, 1944, December 31, 1946, and December 31,  
 1948, to December 31, 1951, Inclusive

## Summary of Deficiencies

Year	Deficiency	Penalties		
		Sec. 293(b)	Sec. 294(d)(1)(A)	Section 294(d)(2)
1942 Income tax....	\$ 647.54	\$ 323.77	\$ None	\$ None
1944 Income tax....	886.93	443.47	None	None
1946 Income tax....	1,994.90	997.45	225.52	135.32
1948 Income tax....	3,837.82	1,918.91	448.12	268.87
1949 Income tax....	326.88	163.44	None	78.22
1950 Income tax....	5,426.42	2,713.21	557.80	334.68
1951 Income tax....	1,379.12	689.56	168.80	101.29
Totals .....	\$14,499.61	\$7,249.81	\$1,400.24	\$918.38

Summary of assessments made under the provisions of Internal Revenue laws applicable to jeopardy assessments, on April 2, 1953, for the taxable years ended December 31, 1942, 1944, 1946 and 1948 to 1951, inclusive.

Year	Deficiency	Penalties			Interest to 4-2-53
		Sec. 293(b)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)	
42 Income tax.....	\$ 647.54	\$ 323.77	\$ None	\$ None	\$ 390.43
44 Income tax.....	886.93	443.47	None	None	428.34
46 Income tax.....	1,994.90	997.45	225.52	135.32	723.06
48 Income tax.....	3,837.82	1,918.91	448.12	268.87	932.43
49 Income tax.....	326.88	163.44	None	78.22	59.80
50 Income tax.....	5,426.42	2,713.21	557.80	334.68	667.22
51 Income tax.....	1,379.12	689.56	168.80	101.29	86.83
Totals.....	\$14,499.61	\$7,249.81	\$1,400.24	\$918.38	\$3,288.11

This determination of your income tax and penalty liability has been made upon the basis of information on file in this office.

The above-mentioned penalties have been asserted in accordance with the provisions of the sections of the Internal Revenue Code shown above.

It has been determined that during the calendar years shown below taxable community income, in addition to other items shown herein as additions to income reported, was received by you in the following amounts which you failed to report in your income tax returns for the years mentioned.

Year	Amount Received
1942.....	\$ 3,190.26
1946.....	8,071.16
1948.....	15,273.16
1950.....	22,065.94
1951.....	6,566.77

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Total amount unreported.....\$55,167.29

Your income for the calendar years 1942, 1946, 1948 1950 and 1951 is increased herein by the above-mentioned amounts of unreported income.

#### Adjustments to Net Income

Taxable Year Ended December 31, 1942

Net income as disclosed by return.....\$2,630.76

Additional income:

(a) Other income unreported..... 3,190.26

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Net income adjusted.....\$5,821.02

#### Explanation of Adjustment

(a) This adjustment has been previously explained.

## Computation of Tax

Taxable Year Ended December 31, 1942

Net Income Adjusted.....		\$5,821.02
Less: Personal exemption.....	\$1,200.00	
Credit for dependents.....	700.00	1,900.00
		<hr/>
Balance (surtax net income).....		\$3,921.02
Less: Earned income credit.....		533.70
		<hr/>
Net income subject to normal tax.....		\$3,387.32
Normal tax at 6% on \$3,387.32.....	\$ 203.24	
Surtax on               \$3,921.02.....	567.36	
		<hr/>
Correct income tax liability.....		\$ 770.60
Income tax shown on return Original account No. 1173138 .....		123.06
		<hr/>
Deficiency of income tax.....		\$ 647.54
Penalty—Sec. 293(b), I.R.C. ....		\$ 323.77

## Adjustments to Income

Taxable Year Ended December 31, 1944

Adjusted gross income as disclosed by return .....		\$3,505.07
Additional income:		
(a) Interest income unreported.....	\$ 115.03	
(b) Long-term capital gain increased..	3,558.98	3,674.01
		<hr/>
Adjusted gross income as corrected.....		\$7,179.08
Allowable deduction:		
(c) Standard deduction .....		500.00
		<hr/>
Net income as determined.....		\$6,679.08

## Explanation of Adjustments

(a) There is added the amount of \$115.03 representing interest income determined to have been received by you which you failed to report in your income tax return.

(b) It has been determined that you realized a long-term capital gain of \$4,103.98 from the sale of two pieces of property

during this taxable year, in lieu of \$545.00, the amount reported in your return, an increase of \$3,558.98.

(c) The standard deduction of \$500.00 is allowed under the provisions of section 23(aa) of the Internal Revenue Code.

Computation of Tax	
Taxable Year Ended December 31, 1944	
Net income as determined.....	\$6,679.08
Less Surtax exemptions.....	2,000.00
	<hr/>
Surtax net income.....	\$4,679.08
Surtax .....	\$1,016.56
Net income as determined.....	\$6,679.08
Less: Normal tax exemptions.....	1,000.00
	<hr/>
Net income subject to normal tax.....	\$5,679.08
Normal tax at 3%.....	170.37
	<hr/>
Correct income tax liability.....	\$1,186.93
Income tax liability shown on return, account No. 2121170.....	300.00
	<hr/>
Deficiency of income tax.....	\$ 886.93
Penalty—Sec. 293(b), I.R.C. ....	\$ 443.47

Adjustments to Income	
Taxable Year Ended December 31, 1946	
Adjusted gross income as disclosed by return.....	\$ 4,620.00
Additional income:	
(a) Other income unreported.....	8,071.16
	<hr/>
Total .....	\$12,691.16
Reduction of income:	
(b) Net capital gain decreased.....	497.98
	<hr/>
Adjusted gross income as corrected.....	\$12,193.18
Allowable deduction:	
(c) Standard deduction .....	500.00
	<hr/>
Net income as determined.....	\$11,693.18

## Explanation of Adjustments

(a) This adjustment has been previously explained.

(b) It has been determined that you realized a long-term capital gain of \$1,002.02 from the sale of a lot during this taxable year, in lieu of a short-term capital gain of \$1,500.00, as reported in your return, a decrease of \$497.98 in net capital gain.

(c) The standard deduction of \$500.00 is allowed under the provisions of section 23(aa) of the Internal Revenue Code.

## Computation of Tax

Taxable Year Ended December 31, 1946

Net income as determined.....	\$11,693.18
Less: Exemptions .....	2,000.00
<hr/>	
Balance, subject to surtax and normal tax	\$ 9,693.18
Tentative tax on \$9,693.18.....	\$2,535.68
Less 5% .....	126.78
<hr/>	
Correct income tax liability.....	\$ 2,408.90
Income tax liability shown on return, account No. 2110660.....	414.00
<hr/>	
Deficiency of income tax.....	\$ 1,994.90
Penalty—Sec. 293(b), I.R.C. ....	\$ 997.45
Penalty—Sec. 294(d)(1)(A), I.R.C. ....	\$ 225.52
Penalty—Sec. 294(d)(2), I.R.C. ....	\$ 135.32

## Adjustments to Net Income

Taxable Year Ended December 31, 1948

Net income as disclosed by return.....	\$ 7,721.02
Additional income:	
(a) Other income unreported.....	15,273.16
<hr/>	
Total .....	\$22,994.18
Additional deduction:	
(b) Standard deduction increased.....	142.11
<hr/>	
Net income adjusted.....	\$22,852.07

## Explanation of Adjustments

(a) This adjustment has been previously explained.

(b) The standard deduction claimed in your return in the amount of \$857.89 is increased to \$1,000.00, the amount allowable under the provisions of section 23(aa) of the Internal Revenue Code.

## Computation of Tax

Taxable Year Ended December 31, 1948

Net income adjusted.....	\$22,852.07
Less: Exemptions .....	2,400.00
Balance, subject to surtax and normal tax	\$20,452.07
One-half of \$20,452.07.....	\$10,226.03
Tentative tax on \$10,226.03.....	\$2,725.89
Less reduction under Sec. 12(c), I.R.C. ....	347.11
Total normal tax and surtax on one-half of net income.....	2,378.78
Combined normal tax and surtax (\$2,378.78 x 2).....	4,757.56
Correct income tax liability.....	4,757.56
Income tax liability shown on return, account No. 3203537.....	919.74
Deficiency of income tax.....	\$ 3,837.82
Penalty—Sec. 293(b), I.R.C. ....	\$ 1,918.91
Penalty—Sec. 294(d)(1)(A), I.R.C. ....	\$ 448.12
Penalty—Sec. 294(d)(2), I.R.C. ....	\$ 268.87

## Adjustments to Net Income

Taxable Year Ended December 31, 1949

Net income as disclosed by return.....	\$10,436.47
Additional income:	
(a) Interest income unreported.....	\$705.11
(b) Rental income unreported.....	723.55
Net income adjusted.....	\$11,865.13

Explanation of Adjustments

(a) There is added the amount of \$705.11 representing interest income determined to have been received by you during this taxable year which you failed to report in your income tax return.

(b) There is added the amount of \$723.55 representing net rental income determined to have been received by you during this taxable year which you failed to report in your income tax return. The amount of \$723.55 is computed as follows:

Gross rental income.....	\$1,275.77	
Less expenses:		
Painting .....	\$196.18	
Taxes ( $\frac{3}{4}$ ths of \$93.92).....	70.44	
Depreciation		
( $\frac{3}{4}$ ths off \$325.00) .....	243.75	
Insurance .....	41.85	552.22
		<hr/>
Net rental income, as determined	\$ 723.55	

Computation of Tax

Taxable Year Ended December 31, 1949

Net income adjusted.....	\$11,865.13	
Less: Exemptions .....	2,400.00	
		<hr/>
Balance, subject to surtax and normal tax	\$ 9,465.13	
One-half of \$9,465.13.....	\$ 4,732.56	
Tentative tax on \$4,732.56.....	\$1,030.47	
Less reduction under Sec. 12(c), I.R.C. ....	143.66	
		<hr/>
Total normal tax and surtax on one-half of net income .....	\$ 886.81	
Combined normal tax and surtax (\$886.81 x 2).....	\$ 1,773.62	
Correct income tax liability.....	\$ 1,773.62	
Income tax liability shown on return, account No. 3055321.....	1,446.74	
		<hr/>
Deficiency of income tax.....	\$ 326.88	
Penalty—Sec. 293(b), I.R.C. ....	\$ 163.44	
Penalty—Sec. 294(d)(2), I.R.C. ....	\$ 78.22	

## Adjustments to Income

Taxable Year Ended December 31, 1950

Adjusted gross income as disclosed by return	\$ 4,996.29
Additional income:	
(a) Other income unreported.....	22,065.94
Adjusted gross income as corrected.....	\$27,062.23
Allowable deductions:	
(b) Miscellaneous deductions .....	1,728.11
Net income as determined.....	\$25,334.12

## Explanation of Adjustments

(a) This adjustment has been previously explained.	
(b) Miscellaneous deductions aggregating \$1,728.11 are allowed as follows:	
Contributions .....	\$ 500.00
Interest .....	78.03
Taxes .....	350.08
Legal fees .....	800.00
Total.....	\$1,728.11

## Computation of Tax

Taxable Year Ended December 31, 1950

Net income as determined.....	\$25,334.12
Less: Exemptions .....	2,400.00
Balance, subject to surtax and normal tax	\$22,934.12
One-half of \$22,934.12.....	11,467.06
Tentative tax on \$11,467.06.....	\$3,197.48
Less reduction under Sec. 12(c), I.R.C. ....	303.77
Total normal tax and surtax on one-half of net income.....	\$ 2,893.71
Combined normal tax and surtax (\$2,893.71 x 2).....	\$ 5,787.42
Correct income tax liability.....	\$ 5,787.42
Income tax liability shown on return, account No. 2907507.....	361.00
Deficiency of income tax.....	\$ 5,426.42
Penalty—Sec. 293(b), I.R.C. ....	\$ 2,713.21
Penalty—Sec. 294(d) (1) (A), I.R.C. ....	\$ 557.80
Penalty—Sec. 294(d) (2), I.R.C. ....	\$ 334.68



Adjustments to Net Income  
Taxable Year Ended December 31, 1951

Net income as disclosed by return.....	\$ 6,132.95
Additional income:	
(a) Other income unreported.....	6,566.77
<b>Total</b> .....	<u>\$12,699.72</u>
Additional deductions:	
(b) Taxes .....	\$464.13
(c) Legal fees .....	370.00
	<u>834.13</u>
Net income adjusted.....	<u>\$11,865.59</u>

Explanation of Adjustments

- (a) This adjustment has been previously explained.
- (b) A deduction of \$464.13 is allowed for real and personal property taxes, not claimed in your return.
- (c) A deduction of \$370.00 is allowed for legal fees, not claimed in your return.

Computation of Tax  
Taxable Year Ended December 31, 1951

Net income adjusted.....	\$11,865.59
Less: Exemptions .....	1,800.00
	<u>          </u>
Balance, subject to surtax and normal tax	\$10,065.59
One-half of \$10,065.59.....	\$ 5,032.79
Total normal tax and surtax on one-half of net income.....	\$ 1,134.85
Combined normal tax and surtax (\$1,134.85 x 2).....	\$ 2,269.70
Correct income tax liability.....	\$ 2,269.70
Income tax liability shown on return, account No. 221150162.....	890.58
	<u>          </u>
Deficiency of income tax.....	\$ 1,379.12
Penalty—Sec. 293(b), I.R.C. ....	\$ 689.56
Penalty—Sec. 294(d)(1)(A), I.R.C. ....	\$ 168.80
Penalty—Sec. 294(d)(2), I.R.C. ....	\$ 101.29

Received and Filed July 31, 1953, T.C.U.S.

Served August 3, 1953.

[Title of Tax Court and Cause.]

Docket No. 49897

### ANSWER

The Commissioner of Internal Revenue, by his attorney, Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

(1), (2) and (3) Admits the allegations contained in Paragraphs (1), (2) and (3) of the petition.

(4) Denies the allegations of error contained in Paragraph (4) of the petition and all subparagraphs of Paragraph (4) of the petition.

(5) (a) to (d), inclusive. Denies the allegations contained in subparagraphs (a) to (d), inclusive, of Paragraph (5) of the petition.

(e) For lack of sufficient information, the respondent denies the allegations contained in subparagraph (e) of Paragraph (5) of the petition.

(6) Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

For further answer to the petition herein, respondent alleges:

(7) That for the taxable years 1945 and 1947 the petitioner had additional income from the sources

and in the amounts particularly set forth in the statement contained in the statutory notice of deficiency herein (which by this reference is hereby incorporated herein) and in the attached net worth statement (which by this reference is hereby incorporated herein).

(8) That for the taxable years in question the following schedule shows petitioner's true income tax liability, the amounts reported as income tax liability, the deficiency, and the penalty under Section 293(b), Internal Revenue Code:

Taxable Year	True Liability	Reported Liability	Deficiency	Penalty Section. 293(b)
1945 .....	\$1,420.97	\$274.00	\$1,146.97	\$573.49
1947 .....	1,002.19	317.00	685.19	342.59

(9) That petitioner well knew that he had derived income and incurred income tax liability as hereinabove set forth, and by reason thereof, the return as filed by the petitioner for each of the taxable years 1945 and 1947 is a false and fraudulent return filed with intent to evade tax, and the deficiency in income tax for each of said years is due to fraud with intent to evade tax.

Wherefore, it is prayed the petitioner's appeal be denied and the deficiencies in tax as determined by the Commissioner and as set forth in the statutory notice of deficiency be in all respects approved; that the 50 per cent fraud penalty under Section 293(b) and the penalty under Section 294(d)(2) be added thereto and approved, claim for which penalties is hereby made.

/s/ KENNETH W. GEMMILL,  
E.C.C.

Acting Chief Counsel,  
Internal Revenue Service.

Of Counsel:

B. H. NEBLETT,  
Regional Counsel;

E. C. CROUTER,  
Acting Appellate Counsel;

JOSEPH G. WHITE, JR.,  
Special Attorney,  
Internal Revenue Service.

Milford R. Baumgardner

Docket No. 49897

Net Worth Statement  
Taxable Years 1945 and 1947

	1945	1947
Net Worth at End of Year.....	\$34,434.60	\$51,283.18
Net Worth at Beginning of Year.....	21,679.44	43,129.80
Increase .....	\$12,755.16	\$ 8,153.38
Living Expenses .....	4,000.00	4,500.00
Total .....	\$16,755.16	\$12,653.38
Less Non-taxable Income 1/2 Corrected Capital Gain .....	2,679.52	—0—
Corrected Adjusted Gross Income.....	\$14,075.64	\$12,653.38
1/2 to Husband—1/2 to Wife.....	\$ 7,037.82	\$ 6,326.69
Adjusted Gross Income per Return.....	\$ 2,372.75	\$ 2,955.91

Understatement of Adjusted Gross Income .....	\$ 4,665.07	\$ 3,370.78
Less Portion of Understatement of Ad- justed Gross Income Attributable to Understatement of Capital Gain.....	775.51	—0—
	<hr/>	<hr/>
Other Income Unreported (Statutory Notice of Deficiency).....	\$ 3,889.56	\$ 3,370.78
	<hr/>	<hr/>
Filed September 15, 1953, T.C.U.S.		

[Title of Tax Court and Cause.]

Docket No.49899

### ANSWER

The Commissioner of Internal Revenue, by his attorney, Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits, denies and alleges as follows:

(1), (2) and (3) Admits the allegations contained in Paragraphs (1), (2) and (3) of the petition.

(4) Denies the allegations of error contained in Paragraph (4) of the petition and all subparagraphs of Paragraph (4) of the petition.

(5) (a) to (k), inclusive. Denies the allegations contained in subparagraphs (a) to (k), inclusive, of Paragraph (5) of the petition.

(1) For lack of sufficient information, the respondent denies the allegations contained in subparagraph (1) of Paragraph (5) of the petition.

(6) Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

For further answer to the petition herein, respondent alleges:

(7) That for the taxable years 1942, 1944, 1946 and 1948 through 1951 the petitioners had additional income from the sources and in the amounts particularly set forth in the statement contained in the statutory notice of deficiency herein (which by this reference is hereby incorporated herein) and in the attached net worth statement (which by this reference is hereby incorporated herein).

(8) That for the taxable years in question the following schedule shows the petitioners' true income tax liability, the amounts reported as income tax liability, the deficiency, and the penalty under Section 293(b), Internal Revenue Code:

Taxable Year	True Liability	Reported Liability	Deficiency	Penalty Section 293(b)
1942 .....	\$ 770.60	\$ 123.06	\$ 647.54	\$ 323.77
1944 .....	1,186.93	300.00	886.93	443.47
1946 .....	2,408.90	414.00	1,994.90	997.45
1948 .....	4,757.56	919.74	3,837.82	1,918.91
1949 .....	1,773.62	1,446.74	326.88	163.44
1950 .....	5,787.42	361.00	5,426.42	2,713.21
1951 .....	2,269.70	890.58	1,379.12	689.56

(9) That petitioners well knew that they had derived income and incurred income tax liability as

hereinabove set forth, and by reason thereof, the return as filed by the petitioners for each of the taxable years 1942, 1944, 1946 and 1948 through 1951 is a false and fraudulent return filed with intent to evade tax, and the deficiency in income tax for each of said years is due to fraud with intent to evade tax.

(10) That the petitioners filed their income tax return for the taxable years 1948 and 1949 on March 1, 1948, and April 15, 1949, respectively, with the Collector of Internal Revenue for the Sixth District of California at Los Angeles. In said returns petitioners omitted from gross income amounts properly includible therein which are in excess of 25 per cent of the amounts of the gross income stated in the respective returns within the provision of Section 275(c) of the Internal Revenue Code. The statutory notice of deficiency herein was mailed on May 11, 1953, and previously on April 2, 1953, the entire deficiencies and penalties as set forth therein for the taxable years 1948 and 1949, were assessed under the provisions of the Internal Revenue Code applicable to jeopardy assessments, both dates being within five years of the date of the filing of said returns, and the proceeding and assessment against the petitioners is not barred by the provisions of Section 275 of the Internal Revenue Code.

Wherefore, it is prayed the petitioners' appeal be denied and the deficiencies in tax as determined by the Commissioner and as set forth in the statutory notice of deficiency be in all respects ap-

proved; that the 50 per cent fraud penalty under Section 293(b) and the penalties under Section 294(d)(1)(A) and Section 294(d)(2) be added thereto and approved, claim for which penalties is hereby made.

/s/ KENNETH W. GEMMILL,  
E.C.C.

Acting Chief Counsel,  
Internal Revenue Service.

Of Counsel:

B. H. NEBLETT,  
Regional Counsel;

E. C. CROUTER,  
Acting Appellate Counsel;

JOSEPH G. WHITE, JR.,  
Special Attorney,  
Internal Revenue Service.



Net Worth Statement  
Taxable Years 1942, 1946, 1948, 1950, 1951

	1942	1946	1948	1950	1951
Net Worth at End of Year.....	\$14,273.76	\$43,129.80	\$70,275.24	\$90,945.11	\$97,723.07
Net Worth at Beginning of Year.....	10,367.85	34,434.60	51,283.18	70,196.92	90,945.11
Increase .....	\$ 3,905.91	\$ 8,695.20	\$18,992.06	\$20,748.19	\$ 6,777.96
Living Expenses .....	2,500.00	4,500.00	4,860.01	6,906.42	8,145.26
Total .....	\$ 6,405.91	\$13,195.20	\$23,852.07	\$27,654.61	\$14,923.22
Less Depreciation .....	210.00*	—0—	—0—	512.50*	1,197.50*
Less Tax-free Income— $\frac{1}{2}$ of Long-term Capital gain .....	—0—	1,002.02	—0—	70.88	—0—
Corrected Adjusted Gross Income.....	\$ 6,195.91	\$12,193.18	\$23,852.07	\$27,062.23	\$13,725.72
Adjusted Gross Income per Return.....	3,005.65	4,620.00	8,578.91	4,996.29	7,158.95
Understatement of Adjusted Gross Income.....	\$ 3,190.26	\$ 7,573.18	\$15,273.16	\$22,065.94	\$ 6,566.77
Add Amount of Overstatement of Capital Gain....	—0—	497.98	—0—	—0—	—0—
Other Income Unreported (Statutory Notice of Deficiency) .....	\$ 3,190.26	\$ 8,071.16	\$15,273.16	\$22,065.94	\$ 6,566.77

\*Depreciation is allowed as a deduction since no allowance for depreciation was made in computation of Net Worth.

Filed September 15, 1953, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 49897

### REPLY

Petitioner replying to the affirmative allegations contained in Respondent's Answer, admits, denies and alleges as follows:

(7) Denies the allegations of Paragraph (7).

(8) Denies the allegations of Paragraph (8) except the allegation as to the amount of income tax liability reported by petitioner for the years in question.

(9) Denies the allegations of Paragraph (9).

Wherefore, it is prayed that respondent's determination of deficiencies and penalties be denied, and that the prayer of petitioner's Petition be granted.

/s/ GEORGE BOUCHARD,  
Counsel for Petitioner.

Received and filed November 2, 1953, T.C.U.S.

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[Title of Tax Court and Cause.]

Docket No. 49899

### REPLY

Petitioners replying to the affirmative allegations contained in Respondent's Answer, admit, deny and allege as follows:

(7) Deny the allegations of Paragraph (7).

(8) Deny the allegations of Paragraph (8) except the allegation as to the amount of income tax liability reported by petitioners for the years in question.

(9) Deny the allegations of Paragraph (9).

(10) Admit the allegations of Paragraph (10) except petitioners deny that they omitted from gross income amounts properly includable therein which are in excess of twenty-five per cent (25%) of the amounts of gross income stated in their respective returns for the years involved. Petitioners allege that the proceedings and assessments against them are barred by the provisions of Section 275 of the Internal Revenue Code.

Wherefore, it is prayed that respondent's determination of deficiencies and penalties be denied, and that the prayer of Petitioners' petition be granted.

/s/ GEORGE BOUCHARD,  
Counsel for Petitioners.

Received and filed November 2, 1953. T.C.U.S.

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[Title of Tax Court and Cause.]

Docket No. 49897

### AMENDMENTS TO ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief

Counsel, Internal Revenue Service, and amends the answer heretofore filed in this proceeding in the following particulars, to wit:

Paragraph (8) of the answer is amended to read as follows:

(8) That for the taxable years in question the following schedule shows petitioner's true income tax liability, the amounts reported as income tax liability, the deficiency, the penalty under Section 293(b) and the penalty under Section 294(d)(2), Internal Revenue Code of 1939:

Taxable 1945	True Liability	Reported Liability	Deficiency	Penalty Sec. 293(b)	Penalty Sec. 294(d)(2)
1945 ....	\$1,420.97	\$274.00	\$1,146.97	\$573.49	\$ 73.38
1947 ....	2,243.68	317.00	1,926.68	963.34	115.98

The respondent hereby claims the aforesaid increased deficiencies for the taxable year 1947 in Federal income tax and penalties.

The Wherefore clause of the answer is amended to read as follows:

Wherefore it is prayed that the petitioner's appeal be denied and the deficiencies in tax and penalties, including the increased deficiency in tax and penalty for the taxable year 1947, be approved.

/s/ JOHN POTTS BARNES,

R.E.M.,

Chief Counsel,

Internal Revenue Service.

Filed at hearing November 30, 1955.

[Title of Tax Court and Cause.]

Docket Nos. 49897, 49898, 49899

# MEMORANDUM FINDINGS OF FACT AND OPINION

The Commissioner determined the following deficiencies in income tax and additions to tax:

Against petitioners Milford R. Baumgardner and Pearl E. Baumgardner, husband and wife:

Year	Deficiency	Additions to Tax		
		Sec. 293(b)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1942 .....	\$ 647.54	\$ 323.77	\$ None	\$ None
1944 .....	886.93	443.47	None	None
1946 .....	1,994.90	997.45	225.52	135.32
1948 .....	3,837.82	1,918.91	448.12	268.87
1949 .....	326.88	163.44	None	78.22
1950 .....	5,426.42	2,713.21	557.80	334.68
1951 .....	1,379.12	689.56	168.80	101.29

Against petitioner Milford R. Baumgardner:

1945 .....	\$1,146.97	\$ 573.49	\$ 73.38
1947 .....	685.19	342.59	41.50

Against petitioner Pearl E. Baumgardner:

1945 .....	\$1,146.97	\$ 573.49	\$ 73.38
1947 .....	685.19	342.59	41.50

In an amended answer the Commissioner claims increased deficiencies for the year 1947, both in dockets 49897 and 49898, as follows:

Tax	Additions to Tax	
	Sec. 293(b)	Sec. 294(d)(1)(A)
\$1,926.68 .....	\$963.34	\$115.98

The questions involved are whether petitioners reported all of their income for the years in question; whether the additional assessments for the

years in question, with the exception of 1950 and 1951, are barred by Section 275 of the Internal Revenue Code of 1939; whether any part of the deficiencies was due to fraud; and whether the additions to tax for failure to file declarations of estimated tax and for substantial underestimate of estimated tax were properly made. This latter issue was raised by the pleadings, but no evidence was introduced other than evidence disputing the deficiencies upon which the additions to tax were based.

### Findings of Fact

The stipulated facts are so found and the stipulation and the exhibits referred to therein are incorporated by reference.

During the taxable years petitioners were husband and wife. They resided in the City of Hawthorne, California. For the years 1942, 1943, 1944 and 1946, Milford (hereafter sometimes referred to as petitioner) filed separate returns in which he claimed his wife as an exemption. For 1945 and 1947 petitioner and Pearl filed separate returns on a community property basis. For 1948 to 1951, inclusive, joint returns were filed. All returns were filed with the Collector of Internal Revenue for the Sixth District of California.

Petitioner was born in 1903. He came to California from Oklahoma in 1924. In Oklahoma he had been variously employed by a transfer company, a grocery firm, and as a motion picture operator. After coming to California he worked as a dish-

washer in a restaurant and in a pool hall. He was also employed in the Hawthorne Fire Department at a small salary. He and Pearl were married in 1927 and in that year he became a member of the Hawthorne police force. He remained on the force, except for a few short periods, until his retirement in 1953. He was Chief of Police for the City of Hawthorne from 1937 until his retirement. After her marriage, Pearl remained at home as a housewife and had no income except from the operation of a dress shop from March, 1948, to May, 1950.

For the years 1925 to 1951, inclusive, petitioner earned the following income from the City of Hawthorne:

1925	.....\$	45.00
1926	.....	1,770.00
1927	.....	1,800.00
1928	.....	1,840.00
1929	.....	1,920.00
1930	.....	1,443.36
1931	.....	2,068.06
1932	.....	1,561.84
1933	.....	0
1934	.....	1,025.50
1935	.....	1,570.00
1936	.....	1,609.24
1937	.....	1,768.02
1938	.....	2,236.69
1939	.....	2,220.00
1940	.....	2,280.00
1941	.....	2,284.20

1942	.....	\$2,400.84
1943	.....	2,775.09
1944	.....	2,820.07
1945	.....	3,066.99
1946	.....	3,106.17
1947	.....	3,911.83
1948	.....	4,213.76
1949	.....	4,507.21
1950	.....	3,485.80
1951	.....	6,061.70

Petitioners filed no federal income tax returns for the years 1930 to 1939, inclusive. For the years 1940 and 1941 petitioner filed returns showing no tax. Pearl filed no returns. Prior to 1942 petitioners had never paid an income tax.

In June of 1937 petitioner applied to the Bank of America for a loan of \$200 to pay off another obligation with the Bank which then had a balance of \$65.98 and to take care of funeral expenses of \$140. This loan was rejected. On the loan application, which was signed by the petitioner, appears the information that there was at this time \$250 owing by the petitioner to Acme Loan which was being paid off in monthly installments of \$32.08, \$105 owing to Inglewood Furniture which was being paid off in monthly installments of \$5, and \$70 owing to Federal Outfitting Company which was being paid off in monthly installments of \$4. On this application petitioner listed no other income or no source of income other than from the Police De-



partment, though the application specifically asked for this information.

In April of 1938 petitioner applied to the Bank of America for a personal loan of \$200 for the purpose of taking a vacation trip to Oklahoma. On the loan application, which was signed by the petitioner, appears the information that petitioner owed \$40 to the Marbro Department Store which was being paid off in \$5 monthly installments and also owed \$40 to the Inglewood Furniture Company which was being paid off in monthly installments of \$5. On this application petitioner listed no other income or source of income other than from the Police Department, though the loan application specifically asked for such information.

In January of 1939, petitioner negotiated a loan of \$480.30 from the Bank of America to refinance a used 1938 Chevrolet and contracted to make payments of \$32.02 per month. On the purchase statement signed by petitioner he listed as income only a salary of \$185 per month and listed nothing under other income or source of other income.

In an application for a loan on property in 1941 signed by both petitioners their annual income is stated to be \$2,400.

An analysis of the records of the Bank of America where petitioners carried accounts made by a special agent engaged in the investigation leading up to the deficiencies herein, showed little activity,

no large balances and no large deposits or withdrawals during the years 1940 to 1944, inclusive.

In 1946 petitioner purchased for Jim Bruno a one-half interest in the Beacon Cafe. Petitioner put up the money for this transaction but was reimbursed by Bruno. The following year the other half interest was also purchased for Bruno. Petitioner had no interest in the cafe.

By gift from another partner petitioner became the owner of a 5 per cent limited partnership interest in a poker club, called the Embassy Club, in the City of Hawthorne in 1951. On December 31, 1951, there was a balance of \$673.06 in petitioner's capital account in the club.

Petitioner kept no records of real estate transactions, the poker club, rentals, interest, dividends or "commissions," the latter being reported on returns for 1947, 1948, and 1949 in rounded amounts of \$2,000, \$3,000, and \$6,000, respectively.

Petitioners received interest income during the taxable years from savings accounts, trust deeds and a note in the following amounts:

1944	.....\$	115.03
1945	.....	768.77
1946	.....	1,093.39
1947	.....	929.74
1948	.....	904.09
1949	.....	705.11
1950	.....	626.18
1951	.....	530.53

Most of this interest was collected by a bank and credited to the petitioners' account. It was not reported on the tax returns.

During 1949 petitioners received \$1,550 in rentals. Of this sum \$1,250 was paid by the tenant to a bank and credited on petitioners' account. The remainder was paid to petitioner by check. These amounts were not reported on the tax return for 1949.

Petitioners received dividend income in the years 1943 to 1948, inclusive, and in 1951 in amounts ranging from \$12.50 to \$50 which were unreported on the tax returns for those years.

Petitioner was entitled to a distributable share in the amount of \$1,126.81 in 1951 from the poker club in which he was a limited partner. He did not report this amount on his tax return.

Petitioners sold two properties in 1944 reporting a gain on their income tax return of \$430 on one piece and \$780 on the other. These sales actually resulted in gains of \$4,527.28 and \$2,136.26, respectively. In 1945 another piece of property was sold on which there was a reported gain of \$2,257. The actual gain was \$5,359.05.

In determining the deficiencies herein the Commissioner used a schedule of petitioners' assets and liabilities from which their net worth was computed as follows:

12/31/40	.....	\$ 9,358.67
12/31/41	.....	10,367.85
12/31/42	.....	14,273.76

12/31/43	\$15,219.48
12/31/44	21,679.44
12/31/45	34,434.66
12/31/46	43,129.80
12/31/47	51,283.18
12/31/48	67,375.44
12/31/49	70,597.12
12/31/50	91,345.31
12/31/51	98,123.27

This schedule contained an item "Investment-Beacon Cafe" which was carried for the year ended December 31, 1946, at \$13,547.26 and for each of the following years through December 31, 1951, at \$16,842.26. Petitioner had no investment in the Beacon Cafe in those years.

It also carried an item of \$100 "Cash on hand" in each of the years in question.

Petitioners had cash on hand of \$5,000 for each of the years ended December 31, 1940, through December 31, 1944, and \$3,000 for each of the years ended December 31, 1945, through December 31, 1951.

The schedule also carried an item in the year ended December 31, 1951, of \$673.06 entitled "Embassy Club." This item represents petitioners' balance in his capital account in the club.

The above three items affecting net worth are the only disputed items in the net worth schedule. In other respects the schedule of assets and liabilities (Exhibit 1-A included herein by reference) is

found to be true and accurate, as is the schedule of living expenses (Exhibit 2-B, also included herein by reference). Our findings above with respect to the disputed items appearing on the schedule of assets and liabilities will be given effect in a Rule 50 computation.

Statutory notices of deficiency were mailed to petitioners on May 11, 1953.

The returns for each of the years in which there is a deficiency, except those for the years 1945 and 1947 filed by Pearl, were false or fraudulent with intent to evade tax and part of the deficiency in each of such years was due to fraud with intent to evade tax.

### Opinion

Tietjens, Judge:

The Commissioner determined the tax liability of petitioners for the years in question by the net worth method for all years except 1944 and 1949. For the latter years the deficiencies were determined on the basis of specific items of unreported income. So determined, petitioners' taxable income exceeded their reported income as follows:

Year	Net Worth Method	Specific Item
1942 .....	\$ 3,190.26	
1943 .....	—	
1944 .....	2,160.41	\$3,674.01
1945 .....	8,804.76	
1946 .....	7,535.12	
1947 .....	15,042.74	
1948 .....	12,231.15	
1949 .....	1,529.86	1,428.66
1950 .....	20,837.46	
1951 .....	5,938.12	

The assessment of taxes for all of the years, except 1950 and 1951, is barred by the statute of limitations unless the returns were fraudulent with intent to evade tax. Whether this was so is a question of fact with the burden on the Commissioner to prove fraud by clear and convincing evidence. This burden, we think, has been carried with respect to all returns, except those of Pearl filed for the years 1945 and 1947. Assessments against her for those years are therefore barred.

Computations were introduced in evidence by stipulation showing petitioners' net worth as ascertained by the Commissioner's investigation at the end of 1940 and each of the years before us. Petitioners concede that these computations are substantially correct but complain in three respects with reference to the schedule of assets, namely (1) cash on hand, (2) investment in the Beacon Cafe, and (3) the item of \$673.06, "Embassy Club" in 1951. Petitioners also objected to several items in the schedule of living expenses which entered into the net worth computation but no evidence was introduced bearing on these items.

The disputed items will be commented on separately.

#### Cash on Hand

The Commissioner determined that petitioners had \$100 cash on hand at the beginning and end of each of the taxable years. Petitioner testified, however, that he had accumulated \$2,000 to \$3,000 in

cash when he came to Oklahoma and that by 1939 he had made \$15,000 to \$16,000 as profit by dealing in defaulted bearer bonds of the City of Hawthorne. We are willing to believe that petitioner did invest in these bonds which at times sold for as little as ten to fourteen cents on the dollar. His testimony in this respect is corroborated by the witness Travers who was in charge of the municipal bond department of a Los Angeles investment firm which dealt in the Hawthorne bonds. Travers testified in a general way that petitioner bought bonds in an amount ranging from \$15,000 to \$35,000 par value. He in no way, however, testified as to the price paid by petitioner for the bonds or that he knew of any profit made by petitioner as a result of his purchases or sales. There is no evidence as to how long petitioner kept his bonds, or as to their maturity dates and he was vague as to whether he had held them to maturity or whether they were sold and the price for which they were sold. The investment house records which would have shown purchases by petitioner from Travers had he made them did not show any such transactions. We cannot accept this testimony as establishing that petitioner accumulated cash in anywhere near the amount claimed as profits. His income tax returns reported no such profit. His borrowing from banks in the period just before 1942 in small amounts tends to show no such accumulation of cash by the date of the opening net worth computation and we do not believe petitioner's claim that he kept a large cash hoard hidden at times under the corners of rugs in his house and

at other times carried it in a money belt. We do believe, however, that petitioner had a substantially larger sum of cash during the years involved than the Commissioner's computation shows and after careful consideration of all the evidence on this point we have found as a fact that petitioner did have cash in the amount of \$5,000 on December 31, 1940, and at the end of each of the years 1941, 1942, 1943, and 1944, and that at the end of each of the taxable years thereafter, he had cash in the amount of \$3,000. The net worth computations should be adjusted to reflect these findings.

### Beacon Cafe

As to this asset the Commissioner contends that petitioner was a silent partner owning 50 per cent of the Beacon Cafe from January 10, 1947, to March 3, 1948, and that thereafter he became sole owner by the purchase of the other half interest. Petitioner testified that he had entered into the cafe transaction as a "front" for Jim Bruno and that he had been reimbursed by Bruno for the cash used in the purchase. Bruno had died before the hearing of the case and we have no testimony from him. The evidence with regard to the purchase of the cafe and of petitioner's part in it is indeed confusing. Petitioner's testimony, however, is corroborated in some respects by other witnesses. After carefully weighing all the evidence bearing on the purchase and ownership of the cafe we have found as a fact that petitioner had no interest in the Beacon Cafe. Ac-



cordingly, it should be eliminated as an asset of petitioner's in the net worth computation.

### Embassy Club

Petitioner contends this item of \$673.06 appearing in the year ended December 31, 1951, should not be treated as an asset in that year. However, the evidence is convincing that petitioner was the owner of a 5 per cent limited partnership interest in the Embassy Club in the year 1951 and that the item of \$673.06 remained on the partnership books at the end of the year to the credit of petitioner's capital account. We perceive no reason for not treating the amount as an asset of petitioner's at the end of 1951.

The foregoing adjustments can be given effect in a Rule 50 computation. Except for the year 1946 it is apparent they will not materially affect the deficiencies as determined. With these adjustments we find the net worth computations as reliable as net worth computations ever can be. The fact that several items therein have been attacked by petitioner and that to some extent we have found the attack to be meritorious would not justify us in disregarding the computations in their entirety.

### Fraud

On the fraud issue, we are faced with under-reporting of income in substantial amounts over a number of years. While fraud is never presumed and the mere understatement of income alone may

be insufficient evidence of fraud, yet consideration of the record as a whole convinces us that the returns here involved, with the exception of those filed by Pearl, were fraudulent with intent to evade tax and that part of the deficiencies in each year were due to fraud. Our conclusion in this respect is based, among other things, on our observation of the witnesses, our appraisal of their credibility, the demonstrated increase in net worth over the years without satisfactory explanation of failure to report actual income, the conceded failure to report true gains on real estate transactions in at least two of the taxable years, as well as the nonreporting of dividends, rentals, and interest. Adding up all the facts and the inferences to be drawn from them, we think the Commissioner has met his burden of proving fraud by clear and convincing evidence.

In reaching this conclusion we have not been influenced by the testimony of two witnesses to the effect that they paid so-called "protection" money to enable them to operate a house of prostitution free from police interference in Hawthorne. While the story told by these witnesses is some indication that "protection" payments were made in the City of Hawthorne, the record contains no convincing evidence tracing the payments testified about to petitioner.

No evidence was adduced with respect to the additions to tax pursuant to Sections 294(d)(1)(A) and 294(d)(2) and the Commissioner's determination in this respect is sustained.

Also, for the years 1944 and 1949 where the deficiencies were not based on net worth, the record supports the Commissioner and his determination is approved.

As indicated above, a rule 50 computation giving effect to the adjustments in net worth set out in this opinion may result in there being no deficiency in one or more of the taxable years. In that event the addition to tax for fraud will be eliminated as a matter of course.

Decisions will be entered under Rule 50.

Received May 1, 1956.

Served May 9, 1956.

Filed and entered May 9, 1956.

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The Tax Court of the United States  
Washington

Docket No. 49897

MILFORD R. BAUMGARDNER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and

Opinion filed May 9, 1956, the parties having filed on August 28, 1956, an agreed computation of tax, now, therefore, it is

Ordered and Decided: That there are deficiencies in income tax and penalties for the taxable years 1945 and 1947 in the amounts as follows:

Year	Tax Deficiency	Penalties	
		Sec. 293(b)	Sec. 294(d)(2)
1945 .....	\$856.96	\$428.48	\$55.98
1947 .....	316.16	158.08	19.35

/s/ NORMAN O. TIETJENS,  
Judge.

[U. S. Tax Court Seal.]

Served August 30, 1956.

Entered August 30, 1956.

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The Tax Court of the United States  
Washington

Docket No. 49899

MILFORD R. BAUMGARDNER and PEARL E.  
BAUMGARDNER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and

Opinion filed May 9, 1956, the parties having filed on August 28, 1956, an agreed computation of tax, now, therefore, it is

Ordered and Decided: That there is no deficiency in income tax and no penalty for the taxable year 1946; and that there are deficiencies in income tax and penalties for the taxable years 1942, 1944, 1948, 1949, 1950 and 1951 in the amounts as follows:

Year	Tax Deficiency	Penalties		
		Sec. 293(b)	Sec. 294(d) (2)	Sec. 294(d) (1) (A)
1942 ....	\$ 647.54	\$ 323.77	\$ .....	\$ .....
1944 ....	886.93	443.47	.....	.....
1948 ....	2,954.28	1,477.14	215.86	323.78
1949 ....	326.88	163.44	78.22	.....
1950 ....	5,426.42	2,713.21	334.68	557.80
1951 ....	1,434.62	717.31	104.62	174.36

/s/ NORMAN O. TIETJENS,  
Judge.

[U. S. Tax Court Seal.]

Served August 30, 1956.

Entered August 30, 1956.

In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket Nos. 49897 and 49899

MILFORD R. BAUMGARDNER and PEARL E.  
BAUMGARDNER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW

Taxpayers, the petitioners in this cause, by George Bouchard, their counsel, hereby file their petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States entered August 29, 1956 (T.C. Memo 1956-112), determining deficiencies in petitioners' Federal income taxes for the calendar years 1942, 1944, 1945, 1947, 1948, 1949, 1950 and 1951, and 50% fraud penalties for each year and penalties for failure to file declarations of estimated tax and for substantial understatement of estimated tax. Petitioners respectfully show:

I.

The petitioners are husband and wife, residing in the City of Hawthorne, California.

For the years 1942, 1943, 1944 and 1946 petitioner husband filed a separate return, reporting all income

and claiming his wife as an exemption. For the years 1945 and 1947 petitioners filed separate returns on a community property basis. For the years 1948 to 1951, inclusive, petitioners filed joint returns. All returns were filed with the Collector of Internal Revenue for the Sixth District of California, which said collection district is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought pursuant to Section 7482 and Section 7483 of the Internal Revenue Code.

## II.

### Nature of the Controversy

The controversy involves the proper determination of the petitioners' liability for Federal income taxes for the calendar years 1942, 1944, 1945, 1947, 1948, 1949, 1950 and 1951, the propriety of the respondent's use of the so-called "net worth method" in determining such liability, the accuracy of such determination, and the question of whether the petitioners filed their tax returns for the years involved with the intent to evade tax and are therefore liable for the 50% penalty for fraudulent underpayment of tax under Section 293 of the Internal Revenue Code of 1939, and whether petitioners are liable to penalties for failure to file declarations of estimated tax and for substantial understatement of estimated tax under the provisions of Sections 294(d)(1)(A) and 294(d)(2).

Using the "net worth method," the Commissioner of Internal Revenue determined that petitioner Mil-

ford R. Baumgardner received taxable income which he fraudulently failed to report in each of the years 1942, 1944, 1945 and 1947, and similarly determined that the petitioners Milford R. Baumgardner and Pearl E. Baumgardner received taxable income which they fraudulently failed to report in each of the years 1948, 1949, 1950 and 1951. The Commissioner of Internal Revenue also determined that petitioners were liable for penalties for failure to file declarations of estimated tax and for substantial understatement of estimated tax. Except as to the amounts of income determined by the Commissioner of Internal Revenue to have been received by petitioners in each of the taxable years, the Tax Court sustained the determinations of the Commissioner and redetermined deficiencies, fraud penalties and penalties for failure to file declarations of estimated tax and for substantial understatement of estimated tax for each of the years in question.

### III.

The said taxpayers, being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Court, and by its decision entered pursuant thereto, desire to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE BOUCHARD,  
Counsel for Petitioners.

Received and filed November 19, 1956, T.C.U.S.



[Title of Court of Appeals and Cause.]

T.C. Docket Nos. 49897 and 49899

STATEMENT OF POINTS

Now comes the taxpayers, petitioners herein, by their attorney, George Bouchard, and hereby assert the following errors, which they intend to urge on review by the United States Court of Appeals for the Ninth Circuit of the decisions of the Tax Court of the United States in the above causes on May 9, 1956:

1. The Tax Court erred in failing to apply the legal requirements in the use of the "net worth method" in computing taxable income.
2. The Tax Court erred in holding that the respondent had satisfied his burden of proving fraud by the "net worth method."
3. The Tax Court erred in holding that petitioners were liable for penalties for failing to file proper estimates of tax liability.
4. The Tax Court erred in failing to find that the assessment and collection of additional taxes for all years prior to the year 1950 were barred by the statute of limitations.

/s/ GEORGE BOUCHARD,  
Counsel for Petitioners.

Filed November 19, 1956, T.C.U.S.

The Tax Court of the United States

Docket Nos. 49897, 49898, and 49899

MILFORD R. BAUMGARDNER, PEARL E.  
BAUMGARDNER, MILFORD R. BAUM-  
GARDNER & PEARL E. BAUMGARDNER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### PROCEEDINGS

November 29, 1955—10:40 A.M.

Before: Honorable Norman O. Tietjens, Judge.

Appearances:

GEORGE BOUCHARD,

Appearing for and on Behalf of Peti-  
tioners.

THOMAS J. SULLIVAN,

Office of Commissioner of Internal Reve-  
nue,

Appearing for and on Behalf of the  
Respondent.

The Clerk: The Court is in session.

We have, if your Honor please, Docket Nos.  
49897, 49898 and 49899, Milford R. Baumgardner,

Pearl E. Baumgardner, and Milford R. Baumgardner & Pearl E. Baumgardner.

Please state your appearances for the record, gentlemen.

Mr. Bouchard: George Bouchard for the Petitioners.

Mr. Sullivan: Thomas J. Sullivan, for the Respondents.

Mr. Bouchard: I am short of a client.

The Court: Well, we will wait for him if you want to.

Mr. Bouchard: Oh, I don't think that that is essential.

Opening Statement on Behalf  
of the Petitioners

By Mr. Bouchard.

The only opening statement, if the Court please, that I have to make is that those are petitions involving years 1942 through 1951, excepting the year 1943, no additional tax has been charged for that year.

All of the years prior to 1949 are barred by limitations unless the Government sustains an issue of fraud which it has ascertained, excepting perhaps the year 1949 and maybe 1948. These may not be opened, unless the Government—that is barred, unless the Government shows there has been an omission of more than 25%. [3\*]

By agreement with Mr. Sullivan, the Govern-

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ment is going to proceed with our tax case to sustain the issue of fraud in the early years that are clearly barred and will continue along with their presentation. I think that will shorten the trial at the outset.

I want to move that all witnesses who are not testifying, except the parties involved, be excluded from the Court room.

The Court: Any objection to that, Mr. Sullivan?

Mr. Sullivan: No objection.

The Court: Will the witnesses who have been called and who are to testify, please leave the room? I think you can find some place to stay back there.

The Clerk: Will you come this way, ladies and gentlemen?

Mr. Sullivan: I would like to have the agent here at the trial, who will testify.

The Court: Is there any objection to that, Mr. Bouchard?

Mr. Bouchard: No, there is no objection to that, your Honor.

Opening Statement on Behalf  
of the Respondent

By Mr. Sullivan.

May it please the Court, Mr. Bouchard has stated the years in question and he is right that prior [4] to 1950 the Government either has to prove that a twenty-five per cent deficiency exists for the statute to be opened for the years 1948 to 1949 and for the earlier years.

The Respondent's case is a net worth case and the deficiencies and statutory notice were set upon a net worth basis, with the exception of 1944 and 1949, where the deficiencies were set up for specific items of unreported income.

We have entered into extensive stipulations of fact and will present them at the conclusion of my opening statement, the stipulations of fact and seventeen exhibits attached to them.

Informally, Mr. Bouchard and myself agreed to a further stipulation of fact as to the records of the bonding company, that Mr. Bouchard informed me this morning that he was unable now, in light of information that he had learned just last night, to stipulate to that fact. Therefore, we are attempting to have those records at the bonding company checked by the treasurer of the bonding company and we are informed that they are in the archives of the company and he may not be able to get here in time while the Court is sitting to testify to this, which, in that event, at the end of the trial, we would request your Honor to keep this case open so that we may have a deposition taken from the bonding company.

Mr. Bouchard: I would suggest, with respect to that motion, Mr. Sullivan, that the Court need not pass on it [5] until the conclusion of the trial. My information on that might not be accurate or reliable.

The Court: I will reserve any ruling on that motion then with regard to the deposition.

Mr. Sullivan: Yes. sir.

As to the net worth statement which is Exhibit 1-A to the stipulation of fact, there are three items which are in dispute, the Beacon Cafe, the other the Embassy Club and third, the case on hand. We will introduce evidence as to those three items.

As to the schedule of living expenses which is Exhibit 2-B, there are eight items in dispute and the special agent will testify as to those eight items.

In addition to the evidence of net worth, the Respondent will also introduce evidence in his opinion, which will show fraud. We expect to show that the Petitioners had little or no cash on hand at the beginning of the net worth period, the starting point. We expect to introduce evidence that will indicate a course of conduct in the earlier years which is inconsistent with the large cash hoard.

We further expect to introduce evidence showing the concealment of assets, the omission of income from the return, and omission of rental income, dividend income, interest income and income from a bar and restaurant, a poker club. [6]

We will also show the unreporting of capital gain and concealment of income items from the accountant preparing the returns.

At this time, your Honor, I would like to render a stipulation of facts with the seventeen exhibits attached to it.

The Court: The stipulation will be received to go with the exhibits.

Mr. Sullivan: I would like to now call Mr. Pool.

The Clerk: P-o-o-l?

Mr. Sullivan: Yes, sir.

The Clerk: Tell us your name, please?

Mr. Pool: Cal. I. Pool.

Whereupon,

CAL. I. POOL

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sullivan:

Q. Mr. Pool, where do you live?

A. 6760 Third Avenue, Los Angeles.

Q. What is your business or occupation?

A. C.P.A.

Q. And in the course of your business, did you have [7] as a client, a partnership known as the Embassy Club at Gardena, California?

A. Yes.

Mr. Sullivan: Will you mark this as Respondent's Exhibit next in order for identification?

The Clerk: Exhibit R for identification.

(The document above referred to was marked Respondent's Exhibit R for identification.)

The Clerk: If the Examiner please, attached to the stipulation are Exhibits 1-A to 17-Q inclusive.

(The documents above referred to were marked Respondent's Exhibits Nos. 1-A to 17-Q inclusive, for identification and received in evidence.)

(Testimony of Cal. I. Pool.)

The Clerk: And we are now starting with Exhibit R for Respondent.

Q. (By Mr. Sullivan): I show you a document which purports to be a copy letter written by you and I ask you if you can identify that?

A. This is evidently a copy of a letter I wrote to Mr. Baumgardner showing his share of the income and the donations shown on the tax return of the Embassy Club for the period ending May 31, 1951, and the period ending December 31, 1951.

Q. On that letter there is marked "Donations"; could you tell us what the "donations" referred [8] to?

A. Well, that is the partnership share of the donations made by the Embassy Club.

Q. And there are also appearing figures under the title "income"; could you tell us what that refers to?

A. That refers to the Baumgardner partnership, share of the income.

Q. Now do the figures on there represent the figures appearing in the books of the Embassy Club?

A. That is right. Well, no, that would not be the amount on the books of the Embassy Club because there was a variation between the income on the Club books and the income on the tax return due to preferential salaries. These are the accounts—the amounts shown as the partner's distributable shares of the income.

Q. What kind of a Club is the Embassy Club?



(Testimony of Cal. I. Pool.)

A. It is a card room.

Q. What do you mean by a "card room"?

A. Well, it is a legal card room in the City of Gardena.

The Court: Will you speak a little more loudly, please, Mr. Pool?

Mr. Sullivan: At this time, your Honor, I would like to offer this letter in evidence.

The Court: Is there any objection, Mr. Bouchard?

Mr. Bouchard: Yes, I object to it as being [9] immaterial.

The Court: For what purpose, Mr. Pool, was that furnished to Mr. Baumgardner?

The Witness: Well, instead of sending each partner a copy of the tax return, I sent each partner a letter showing the figures that he should use on his personal return.

The Court: And you were employed for that purpose by Mr. Baumgardner?

The Witness: No, I was employed by the Embassy Club.

The Court: The objection is overruled.

The Clerk: Exhibit R.

(The document heretofore marked Respondent's Exhibit R was received in evidence.)

Mr. Sullivan: You may cross-examine, Mr. Bouchard.

The Court: Is that all?

Mr. Sullivan: Yes, sir.

(Testimony of Cal. I. Pool.)

### Cross-Examination

By Mr. Bouchard:

Q. Mr. Pool, how long were you accountant for the Embassy Club?

A. Oh, possibly three or four years.

Q. Three or four years? A. Yes.

Q. Beginning when? [10]

A. Well, I could not say offhand, probably 1949.

Q. Now, you say that was a card room in Gardena? A. Yes.

Q. Card rooms in Gardena are legal, are they not? A. Yes.

Q. I notice in this letter, Exhibit R, you show the income, the distributive income of Mr. Baumgardner, as a partner and the figures 5-31-51—what does that 5-31-51 mean?

A. That is the period five months ending May 31, 1951.

Q. That is the period from January 1 of 1951 through May 31 of 1951; is that right?

A. Yes.

Q. And then do I take it that the date 12-31-51 in which you show income of \$1,116.54 is what was to be determined as Mr. Baumgardner's distributive share for the partnership for the period June 1, '51, to December 31, 1951? A. Right.

Q. Why was the rate for that partnership broken down then, if it was—strike that out, please.

(Testimony of Cal. I. Pool.)

Did you file a return for the partners for the period January 1, 1951, to May 31, 1951?

A. I did.

Q. For the five months' period?

A. Yes. [11]

Q. And then did you file a separate partner return for the period from June 1, 1951, to December 31, 1951?

A. Yes, I did.

Q. Why did you do that?

A. We had a different partner who came in and started the partnership.

Q. You mean that one person who was a partner from the first period sold his interest to someone else and this someone else became a partner for the second period?

A. That is right.

Q. And did the partnership in the second period continue with the same business that had been operating prior to June 1?

A. Yes, it did.

Q. The only change that was made was that you had one different partner; is that right?

A. That is right.

Q. Now, was that a general partnership or a limited partnership?

A. It was a general partnership as far as I know.

Q. And all of the partners, so far as you know, were general partners; is that right?

A. That is right.

Q. In connection with your working as a CPA have you had occasion to prepare tax returns and

(Testimony of Cal. I. Pool.)

Cross-Examination

By Mr. Bouchard:

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A. Oh, possibly three or four years.

Q. Three or four years? A. Yes.

Q. Beginning when? [10]

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(Testimony of Cal. I. Pool.)

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A. I did.

Q. For the five months' period?

A. Yes. [11]

Q. And then did you file a separate partner return for the period from June 1, 1951, to December 31, 1951?

A. Yes, I did.

Q. Why did you do that?

A. We had a different partner who came in and started the partnership.

Q. You mean that one person who was a partner from the first period sold his interest to someone else and this someone else became a partner for the second period?

A. That is right.

Q. And did the partnership in the second period continue with the same business that had been operating prior to June 1?

A. Yes, it did.

Q. The only change that was made was that you had one different partner; is that right?

A. That is right.

Q. Now, was that a general partnership or a limited partnership?

A. It was a general partnership as far as I know.

Q. And all of the partners, so far as you know, were general partners; is that right?

A. That is right.

Q. In connection with your working as a CPA have you had occasion to prepare tax returns and

(Testimony of Cal. I. Pool.)

familiarize yourself [12] with the statute relating to partnership returns and the regulations thereon?

A. Yes.

Q. Don't you know as a fact that the decisions of the Tax Court, the rulings of the Commissioner of Internal Revenue provide that the mere fact that you have a change, addition of a partner to a partnership, who continues in the same business, doesn't entitle you to file returns for long or short periods?

Mr. Sullivan: I object to the question as calling for a conclusion of the witness.

The Court: Well, it is exploring his knowledge of the rules.

The Witness: At that time, I had some doubt as to whether, when a partner dropped out of a partnership, whether or not it dissolved the partnership and created a new partnership.

Q. (By Mr. Bouchard): Then when you did this, you were doubtful if you were doing the right thing or not; is that so?

A. Yes, but I knew it could not hurt anything by filing two partnership returns instead of one.

Q. Did you know that a partnership has to file a return on either a calendar or a fiscal year basis?

A. That is right.

Q. Now, at the end of December, 1951, did you have any [13] change in the partnership—were there any new partners admitted?

A. I don't remember whether there was. There were changes quite often in that period, but I

(Testimony of Cal. I. Pool.)

don't know if there was a change at December 31 or not.

Q. When you say you had a little doubt whether you were doing it the right way in filing two short returns, isn't the thing that you had some doubt about as to whether or not you were entitled to file a partnership return for the period June 1, 1951, to December 31, 1951, or whether you should file the return for the period June 1, 1951, for the complete fiscal year ending May 31, 1952; wasn't that the problem that you had? A. No.

Q. What was your problem?

A. As to whether it was necessary to file a return at May 31st or not.

Q. If, having filed a return for the short period, January 1 to May 31, if that was correct and then if, under the law or the regulations, in filing the next return for that partnership, you were required to file it for a full fiscal year, namely, June 1, 1951, to May 31, 1952, then it would have made a difference, would it not? A. I lost you in there.

Q. You mean you did not understand my [14] question? A. No.

Q. If you were required, under the law, for the second period, to file it for a complete fiscal year, namely, June 1, 1951, to May 31, 1952, then whatever partnership income was subject to tax would have been attached to the parties in the year 1952 and not in the year 1951, wouldn't that be true, Mr. Pool? A. That would be true.

Mr. Bouchard: That is all.

(Testimony of Cal. I. Pool.)

The Court: Mr. Sullivan, do you have anything further?

Mr. Sullivan: Yes.

Mr. Bouchard: May I ask another question? I am sorry, your Honor.

The Court: All right.

Q. (By Mr. Bouchard): Did you make out the partnership returns for the year 1952 also, Mr. Pool? A. I did.

Q. Are you still an employee of the Embassy Club? A. No.

Q. When did you terminate your relationship?

A. When the Embassy Club was sold, I think in 1953.

Q. Now, you did not keep the books of the Embassy Club, did you? [15]

A. I kept part of them.

Q. They have a regular bookkeeper that was employed, and you, as a CPA, made the audits and checked?

A. No, they had a cashier and I came in and did most of the work, the general records.

Q. You actually, yourself, did the work of keeping the books of the Club? A. Yes.

Q. How often did you do that?

A. I was down there every week doing some of the work and gave them a statement whenever one was wanted.

Mr. Bouchard: That is all.



(Testimony of Cal. I. Pool.)

Redirect Examination

By Mr. Sullivan:

Q. Mr. Pool, was that partnership on a calendar year or a fiscal year, perhaps?

A. The partnership which was originally—it was on a calendar year basis.

Q. I show you Exhibits 13-N and 14-M——

Mr. Bouchard: Have I got them?

Mr. Sullivan: No, they are exhibits which were attached to the stipulation.

Q. (By Mr. Sullivan): They are photostatic copies of the partnership returns for the Embassy Club, and I ask you if you can identify [16] them?

A. One of the partnership returns for the Embassy Club for the period January 31, 1951, up to May 31, 1951.

Mr. Bouchard: I submit that they are in evidence as part of the stipulation. They do not need to be identified. They are in the record and they speak for themselves.

Q. (By Mr. Sullivan): Mr. Pool, if, in fact, the partnership should not have been terminated on May 31, 1951, would not the information appearing on both returns covering the year be proper on one return?      A. It would.

Mr. Sullivan: Thank you, that is all. Oh, one more question.

Q. (By Mr. Sullivan): Was the partnership on a calendar year basis in 1951 for the whole year?

(Testimony of Cal. I. Pool.)

A. In 1950 it was on a calendar year basis and prior and subsequent to that. Then it was on a calendar basis. Just this one year, I put it into two returns.

Mr. Sullivan: Thank you.

### Recross-Examination

By Mr. Bouchard:

Q. Mr. Pool, were there any different partners that were members of this partnership for the period January 1, [17] 1951, to May 31, 1951, than there were for the period ending December 31, 1950?

(No response.)

Q. Did any new partners come in?

A. They must have.

Q. Why do you say that?

A. Oh, different partners in a short period than there were in 1950. I could not say offhand on that. I would say no, there wasn't, but it could be. They changed partners quite often.

Q. You think the partners for the period January 1, 1951, to May 31, 1951, were the same partners that had been members of the partnership for the year 1950?

A. I think so.

Mr. Bouchard: All right, that is all.

Mr. Sullivan: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Sullivan: I will call Mr. Ludolph, please.

The Clerk: Will you tell us your name, please, Mr. Witness?

Mr. Ludolph: Richard P. Ludolph. [18]

Whereupon,

RICHARD P. LUDOLPH

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sullivan:

Q. Mr. Ludolph, where do you live?

A. 225 East 126th Street, Hawthorne.

Q. What is your business or occupation?

A. The same address.

Q. What is your business?

A. I am a public accountant.

Q. As a public accountant, have you in prior years had occasion to prepare tax returns for others? A. Yes.

Q. Are you acquainted with the Petitioner in this case, Mr. Baumgardner? A. Yes, I am.

Q. How long have you known Mr. Baumgardner? A. Oh, since about 1939 or 1940.

Q. Have you ever prepared any tax returns for Mr. Baumgardner? A. Yes, I did.

Q. Could you tell us, in preparing Mr. Baumgardner's [19] returns, to the best of your recollection, exactly what transpired, that is, what records

(Testimony of Richard P. Ludolph.)

he brought to you and what records you kept for him and so forth?

A. Well, he had houses for rent and I would usually make up the schedule for him to put down his income and expenses.

Q. What years did you make his return for or prepared his return for?

A. About 1941 or 1943 or through 1951 or 1952, I think.

Q. I show you Exhibits 16 and 17 and ask you if you prepared the original of those documents—they purport to be carbon copies?

A. Yes, sir, I did.

Q. Referring now to Exhibit 16, in schedule B there is listed two houses and frame building and various amounts of income depreciation and so forth—where did you get these amounts?

A. They were furnished to me by Mr. Baumgardner.

Q. Did you keep any independent records of those amounts?

A. No, not before that time, no.

Q. Referring now to Exhibit 17, schedule D, there appears two houses, a house at 158 and a house at 162 and long-term capital gain figured on it—did you keep any records of those houses—where did you get these figures as to the [20] purchase price and sale price?

A. They were furnished to me by Mr. Baumgardner.

Mr. Sullivan: Thank you.

(Testimony of Richard P. Ludolph.)

Mr. Bouchard: May I see the exhibits?

Mr. Sullivan: Yes.

Q. (By Mr. Sullivan): Did Mr. Baumgardner give you any written documents when you came in to prepare the account or did he furnish you with the figures orally?

A. Sometimes I made a schedule for him to make out and he brought it back to me.

Q. I show you Exhibit No. 5-E and I ask you if you prepared the original of this return?

A. Yes, sir, I did.

Q. I show you Exhibit 6-F and I ask you if you prepared the original of that return?

A. Yes, sir, I did.

Q. I show you Exhibit 7-G and I ask you if you prepared the original of that return?

A. Yes, sir.

Q. On the Exhibit 6-F there, under income, there is \$2,000.00 from commissions—where did you get that figure?

A. After I had finished the other blocks on the return, I asked Mr. Baumgardner if he had any other income and he said “Yes,” and that it amounted to about \$2,000.00. [21]

Q. Did he tell you what that income was?

A. No. I asked him, “Will I put that down as commissions?” And he said “yes.”

Q. Did he indicate what it consisted of?

A. No, he did not, just other income. I used the word “commissions.”

Q. Did he show you any schedules as to where

(Testimony of Richard P. Ludolph.)

the commission had come from? A. No, sir.

Q. Did he tell you what it consisted of?

A. No, he did not.

Q. I now show you Exhibit 8-H and I ask you if you prepared the original of that return?

A. Yes, sir, I did.

Q. And that return is listed miscellaneous commissions \$3,000.00—do you know where you got that figure from?

A. That would be the same thing. I asked him how much other income he had and he said “\$3,000.00.”

Q. Did he present you with any document to support this \$3,000.00? A. No, sir.

Q. Did he tell you anything that was in that \$3,000.00 figure? A. No, sir.

Q. What it was composed of? [22]

A. No, sir.

Q. I show you Exhibit 9-I and I ask you if you prepared the original of that?

A. Yes, sir, I did.

Q. It shows miscellaneous commissions \$6,000.00. As to that, would your answer be the same as it was to the \$3,000.00 and the \$2,000.00?

A. Yes, sir, it would.

Q. I show you Exhibit 10-J and I ask you if the original of that document was prepared by you?

A. Yes, sir.

Q. In Schedule F, page 2 of this, there is a—oh, strike that.

On Exhibit 10-J there appears no commissions—

(Testimony of Richard P. Ludolph.)

did you ask Mr. Baumgardner about commissions that year or other income?

A. Yes, I believe I did ask him and he said "No." He said he had had a loss. He had spent all his money trying to get his job back.

Q. But that loss wasn't included in that return, was it?      A. No.

Q. I show you Exhibit 11-K and ask you if you prepared the original of that?

A. Yes, sir, I did. [23]

Q. It is noted here that the only income shown is from the City of Hawthorne and from a Milady's Dress Shop—did you ask Mr. Baumgardner if he had any other income for that year?

Mr. Bouchard: What year is that, Mr. Sullivan?

Mr. Sullivan: 1951.

The Witness: Yes, I did, and I believe his answer was the same for 1951.

Q. (By Mr. Sullivan): Did you ask him specifically whether he had any interest income, any dividend income?

A. No, I did not. I asked him each year how much other income he had.

Q. Did he ever present to you any documents showing any interest income or dividend income?

A. No, he did not.

Q. Did he ever tell you that he had any interest income or dividend income in any of the years that you prepared his returns?

A. No, he did not as such, no.

Q. Did he ever present you with any records?

(Testimony of Richard P. Ludolph.)

A. No, sir.

Q. Did he ever present you with any records as to the homes that appeared on some of the returns as being built? [24]

A. In the last few years, when he had a number of houses, I gave him the schedule to fill out.

Q. But before?

A. Before that, there were no documents, I don't believe.

Q. You mean in 1949 and 1950 by "the last few years"? A. Yes.

Q. Approximately how much time did you spend each year in the preparation of Mr. Baumgardner's income tax return?

A. Not very long. It doesn't take me very long to fill in a return.

Q. Half an hour or four hours or eight hours?

A. Approximately half an hour.

Q. What did Mr. Baumgardner pay you in each of these years?

A. I never did make a charge for making out the returns. I never charge for making out the returns.

Q. Did Mr. Baumgardner ever tell you that he had income from the Embassy Club?

A. No, sir, he did not.

Q. Did he ever tell you that he had any income or loss from the Beacon Cafe?

A. No, sir, he did not as such.

Q. Do you know whether Mr. Baumgardner



(Testimony of Richard P. Ludolph.)

owned any Trust Deeds and received interest income from them? [25]

A. No, sir, at that time, I didn't know.

Q. Did he tell you that he did at any time?

A. No, he did not say anything about it, but just gave me the amount of the other income. That was all.

Q. In each year, did you ask Mr. Baumgardner whether he had earned additional income outside of his salary?

A. When I finished the work, I asked him what other income he had and he would give me the other figure.

Q. Did you ask him at any time to keep records so that you could have access to definite amounts?

A. No, I don't believe I did. An audit job is quite different from an income tax job.

Q. Did you know Mr. Baumgardner personally?

A. Oh, well, yes, like you know anybody in a small town.

Q. Did you know outside of what you learned from preparing his returns, whether he had any Trust Deeds or whether he loaned money or owned any stocks?

A. No, sir, I did not.

Mr. Sullivan: Will you mark this Respondent's Exhibit next in order?

The Clerk: Respondent's Exhibit S.

(The document above referred to was marked Respondent's Exhibit S for identification.) [26]

(Testimony of Richard P. Ludolph.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit S for identification and ask you if you can identify that document?

A. Yes, sir, I believe I prepared it.

Q. And what is that document?

A. It is the California State individual's income tax return.

Q. Did you also prepare his Federal income tax return for that year? A. Yes, sir, I did.

Q. Would the income, in the Federal or the State return be the same as you have shown on the Federal return?

Mr. Bouchard: Just a minute. That is objected to because the Federal return is in evidence.

Mr. Sullivan: The Federal return is not in evidence for that year.

Mr. Bouchard: The year 1945 is not in evidence?

Mr. Sullivan: No, sir.

The Court: Do you withdraw your objection?

Mr. Bouchard: Yes, sir, I thought it was.

The Witness: Yes, sir, that would be practically the same.

Mr. Sullivan: I offer Exhibit S marked for identification in evidence.

Mr. Bouchard: I have no objection. [27]

The Court: Admitted.

(The document marked Respondent's Exhibit S was received in evidence.)

Mr. Sullivan: That is all, your Honor.

The Court: Mr. Bouchard.

Mr. Bouchard: Yes.

(Testimony of Richard P. Ludolph.)

Cross-Examination

By Mr. Bouchard:

Q. Mr. Ludolph, have you ever had an experience in rental experience?           A. Yes, sir.

Q. When?

A. 1921 and 1922 I was investigating officer of the income tax unit, investigating auditor.

Q. In Los Angeles?           A. Yes.

Q. How long have you lived in Hawthorne?

A. Since about 1940.

Q. Do you—strike that. Did you know that Mr. Baumgardner was chief of police?

A. Yes, sir.

Q. Do you know during what years?

A. Oh, since 1940, I think.

Q. Up until when?           A. About 1950. [28]

Q. Did you make out any of his tax returns for years prior to 1940 or 1941, the years that you have identified here?           A. I don't think so.

Q. Had you known Mr. Baumgardner for some time prior to the time you did work for him?

A. Well, I knew who he was, yes.

Q. As I understand you made out the tax returns for the members of the police department and the fire department and any other employees out there, that you did that work for?

A. I think I did it for some of them in the water department, too.

Q. I take it from your testimony that when you made out these returns for Mr. Baumgardner, he

(Testimony of Richard P. Ludolph.)

gave you his salary from the City of Hawthorne and then you asked him if he had any other income in addition to that salary? A. Yes, sir, I did.

Q. And he gave you the figures that are on the tax returns, the \$2,000.00, the \$3,000.00 and the \$6,000.00 figures and whatever else may be there?

A. Yes, sir, he did.

Q. And the point of your question to him was, I take it, to be sure that as far as you were concerned and giving him an opportunity, so far as he was concerned, to get on his tax [29] return all of the income he had?

A. Yes, sir, that was his express desire.

Mr. Bouchard: I think that is all, your Honor.

Mr. Sullivan: That is all, your Honor. Thank you.

The Court: Thank you.

(Witness excused.)

Mr. Sullivan: Mr. Walker, please.

The Clerk: Will you tell us your name, please?

Mr. Walker: Clyde R. Walker.

Whereupon,

### CLYDE R. WALKER

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Sullivan:

Q. Mr. Walker, where do you live?

A. In Hawthorne.

(Testimony of Clyde R. Walker.)

Q. What is your business or occupation?

A. Newspaper distributor.

Q. Directing your attention to the year 1945, what was your business or occupation at that time?

A. Newspaper distributor.

Q. Did you have any other interest?

A. I worked at the Beacon Cafe part time. [30]

Q. Who owned the Beacon Cafe in 1945, if you know?

A. A fellow by the name of Guelff and Clyde Carnes.

Mr. Bouchard: How do you spell that first name?

The Witness: G-u-e-l-f-f, I think.

Q. (By Mr. Sullivan): Do you know if there was a change of partnership in the Beacon Cafe in 1945?

A. There was a change of ownership. My uncle bought out the half interest of Clyde Carnes and Mr. Guelff transferred his half interest to his wife.

Q. How long did your uncle—is that Charles Walker? A. Yes, sir.

Q. How long did your uncle and Janet Guelff operate in the Beacon Cafe?

A. I cannot give you the exact length of time. They operated it until she died. It wasn't too long a time after that.

Q. And do you know what happened to the ownership of the Beacon Cafe after Mrs. Guelff died?

A. Actually I was running it for my uncle. It

(Testimony of Clyde R. Walker.)

was in his interest. He had separated from his wife and at the time the purchase was made I actually put the money up for him, so I was actually managing the cafe until about two or three months after Mrs. Guelfff died and at that time it was changed over and I took over my uncle's portion of the [31] cafe.

Q. In your name? A. Yes, sir.

Q. What happened to Mrs. Guelfff's half interest, if you know? A. It was purchased.

Q. Will you tell the Court what you know about the purchase of Mrs. Guelfff's half interest?

A. Well, around July, to the best of my memory, we had somebody who wanted to buy it and due to the fact that they wanted the whole thing, we had to do something about it and it was tied up in the Court, so in talking to Mr. Baumgardner he mentioned that he would buy the other half, so I petitioned the Court to sell it—the other half interest—at that time, and it was purchased in my name from the Court.

Q. Who put up the money?

A. As far as I know, Mr. Baumgardner.

Q. Then as I understand your testimony, it was actually in your name, the whole interest was in your name? A. Yes, sir.

Q. Did you sign any document that stated that you were holding the other half interest as nominee for Mr. Baumgardner? A. Yes, sir.

Q. Where is that document now?

(Testimony of Clyde R. Walker.)

A. The only time I ever saw it was when it was at the [32] attorney's office with Mrs. Deener.

Q. If you can remember, can you tell us substantially what that document stated?

Mr. Bouchard: That is objected to as not competent.

The Court: Well, the document cannot be produced, I take it. You don't know where the document is, do you?

The Witness: No.

The Court: Have you made any effort to get it?

(No response.)

Mr. Sullivan: Can I lay a further foundation, your Honor?

The Court: Yes.

Q. (By Mr. Sullivan): At whose insistence did you prepare this document?

A. Mr. Baumgardner's.

Q. Do you know if Mrs. Deener still has this document? A. I don't know, no, sir.

Q. Have you made any effort to get this document? A. No.

Q. Did Mr. Baumgardner get a copy of this document?

A. I could not tell you. I don't know whether she gave him one or not. She did not give me one.

Q. Did you sign any papers in the sale of Mrs. Guelff's half interest that was purchased in your name?

(Testimony of Clyde R. Walker.)

A. You mean—I don't quite understand what you mean. [33]

Q. Well——

A. Do you mean did I sign any papers buying her half interest?

Q. Well, the escrow papers and so on?

A. The escrow papers and all from the Court, yes, sir.

Q. Who prepared the escrow?

A. Mrs. Deener.

Q. After the sale of Mrs. Guelfff's half interest was there any agreement between you and Mr. Baumgardner as to the profits or losses of the Beacon Cafe? A. It would be fifty-fifty.

Q. Was that a written or oral agreement?

A. Oral.

Q. Who kept the books of the Beacon Cafe after July, 1946?

A. They were kept up until, I believe, approximately January, by the bookkeeper that I had at that time, a Mr. Glass, and after around January they were kept by Mrs. Strawn.

Q. Who hired Mrs. Strawn?

A. That would be pretty hard to say. Mr. Baumgardner said he would rather that she would keep the books, that he wasn't satisfied with the bookkeeper I had and he would rather she would keep the books, so whether I went over and got her to keep them or whether she came to me or whether he went over, I cannot remember. [34]

Q. Directing your attention to October, 1947,



(Testimony of Clyde R. Walker.)

did anything transpire at this time regarding your interest in the Beacon Cafe?

A. That was the time that I sold my interest in the cafe. The dates have got me all wrong.

Q. Did you sell your interest?

A. Yes, I did.

Q. Who did you sell it to?

A. I sold it to James Staten.

Mr. Bouchard: When was that? I didn't get the year.

Mr. Sullivan: 1947. He wasn't sure about the month.

Mr. Bouchard: All right.

Q. (By Mr. Sullivan): Did Mr. Staten purchase your half interest? A. Yes.

Q. Did you know if he was purchasing that for himself or was he a nominee for someone else?

A. I don't know that.

Q. After you sold your half interest to Mr. Staten, who then owned the Beacon Cafe, if you know?

A. As far as I know, Mr. Staten and Mr. Baumgardner, although it was in Mr. Staten's name. What happened to the other half, I don't know. [35]

Q. Do you know how much was paid into escrow as the purchase price? A. At which time?

Q. At the time the half interest was bought from Mrs. Guelff's estate.

A. \$12,500.00 and half of the inventory.

Mr. Sullivan: That is all. You may cross-examine, Mr. Bouchard.

(Testimony of Clyde R. Walker.)

### Cross-Examination

By Mr. Bouchard:

Q. Mr. Walker, you testified that you petitioned the Probate Court for Mrs. Guelff's interest which was sold to you, is that correct? A. Yes.

Q. And what was the sale price of that?

A. \$12,500.00 and half of the inventory.

Q. That is what you have just told us?

A. Yes.

Q. I think you said so far as you knew, Mr. Baumgardner put up the money. Mr. Baumgardner did not pay any money to you, did he?

A. The money was paid into escrow.

Q. It wasn't paid to you? A. No, sir.

Q. Now, when you sold your half interest in 1947 to Mr. [36] Staten, I think you testified that you did not know whether he was buying it for himself or for someone else; is that correct?

A. No, sir, I presume he was buying it for himself.

Q. But if he wasn't you did not know; is that right? A. Right, sir.

Q. Now, you don't know if Mr. Baumgardner did put up any of this purchase money to buy the Guelff interest? A. No, sir.

Q. You don't know whether he was representing anybody else or not, do you?

A. Whether he was representing anybody else?

Q. Yes. A. No, sir, I do not.

(Testimony of Clyde R. Walker.)

Q. You have had no connection, I take it, with the Beacon Cafe since you sold out in 1947?

A. No, sir.

Q. How much did you sell out your half interest to Mr. Staten for?

A. For \$7,500.00 I sold out, plus half the inventory.

Q. Plus half the inventory? A. Yes.

Q. Had the business between the time that the Guelff interest, some time in July of 1946, was sold and your sale to Mr. Staten in January of 1947, had business gotten worse, Mr. [37] Walker?

A. Yes, sir, it had.

Q. As a matter of fact, it was never a very profitable undertaking, was it?

A. The bottom dropped out of it right after that.

Q. Now, you testified I think that you had an oral agreement with Mr. Baumgardner that you and he would split the profits, if any, is that right?

A. Yes, sir.

Q. But it was never reduced to writing?

A. I would not say that it was never. I would have to qualify my statement to this effect, that I don't remember everything that was in the papers that were drawn up in Miss Deener's office, but there was definitely an oral agreement that he had half of the Beacon and that half of the profits would be his.

Q. Were there any profits between that period of July, 1946, and January, 1947, when you sold out? A. No, sir.

Mr. Bouchard: That is all, Mr. Walker, thank you.

Mr. Sullivan: That is all, thank you, Mr. Walker.

The Court: You are excused.

(Witness excused.)

The Court: What time do you gentlemen want to stop for lunch—12:30? [38]

Mr. Bouchard: It is OK with me.

Mr. Sullivan: Could we call one more witness? He has to get away this afternoon.

The Court: What is his name?

Mr. Sullivan: Staten.

The Court: All right, we will run until 12:30 and then recess until 2:00 oclock.

Mr. Sullivan: Thank you.

The Clerk: Will you tell us your name, Mr. Witness, please?

Mr. Staten: James L. Staten.

Whereupon,

### JAMES L. STATEN

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Sullivan:

Q. Mr. Staten, where do you live?

A. 1414 West El Segundo, Gardena.

(Testimony of James L. Staten.)

Q. What is your business or occupation?

A. I own a trailer park.

Q. Directing your attention to the year 1946, what was your business or occupation at that time?

A. What year was that?

Q. 1946. [39]

A. I do not believe I was doing anything in the year 1946.

Q. Directing your attention to the Beacon Cafe, were you connected with it in any way during the year 1946?

A. Now, I may have been. I was thinking it was 1947. Probably it was 1946, if your records so show.

Q. And in what way were you connected with the Beacon Cafe?

A. Well, I was, I guess you would call it part owner.

Q. Will you tell the Court how you happened to acquire an interest in the Beacon Cafe—how you became part owner?

A. Well, I believe that Jack Baumgardner—I don't remember how it came about—but we were talking about my recently having gotten out of the army and I wasn't doing anything and Mr. Baumgardner mentioned this Beacon Cafe and said, "You have had experience along that line; why don't you take that Beacon Cafe over?"

I don't remember the conversation, but anyway I agreed to take it.

Q. Did you invest any money in it?

(Testimony of James L. Staten.)

A. No, not my own money, none of my own money.

Q. I show you a photostatic copy of an escrow statement dated January 4, 1949, and ask you if you can identify that?

Mr. Bouchard: 1949, did you say? [40]

Mr. Sullivan: Yes.

The Witness: Well, I don't recognize this. This was when I went out.

The Court: Will you speak a little louder, Mr. Witness?

The Witness: All right. I said I do not recognize this one because this was on the sale going out.

Q. (By Mr. Sullivan): I show you Respondent's Exhibit T for identification and ask you if you can identify that? A. Yes.

(The document above referred to was marked Respondent's Exhibit T for identification.)

Q. (By Mr. Sullivan): What is that?

A. Well, this is the escrow when I took over the Beacon Cafe.

Q. Whose interest did you take over in the Beacon Cafe, Mr. Staten?

A. Well, I believe it was Clyde Walker's. In fact, I am sure it was Clyde Walker's.

Q. Directing your attention to this "Deposited into escrow B Account Staten \$2,500.00"—did you deposit that into the escrow?

(Testimony of James L. Staten.)

A. No, that was in escrow when I went to the bank. [41]

Q. Do you know who deposited it in the escrow?

A. No, I don't.

Q. Directing your attention to "James L. Staten, \$5,760"—did you deposit that amount in escrow? A. I did.

Q. Where did you get that money?

A. From Jack Baumgardner.

Q. Will you tell the Court, if you can remember, when and how he gave it to you?

A. We were sitting in a booth at the Beacon Cafe. Clyde Walker was there and Jack handed me this money in an envelope. I presume it was money. Anyway, I just took it over and put it in escrow and I got the receipt for it. I don't know if it was cash or if it was a check.

Mr. Sullivan: At this time, the Respondent offers Exhibit T for identification into evidence.

Mr. Bouchard: No objection.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit T was received in evidence.)

Mr. Bouchard: What is that?

The Clerk: Exhibit T.

Mr. Sullivan: T.

Mr. Bouchard: Thank you.

Mr. Sullivan: Your Honor, I have the account book [42] here, which is rather bulky to have in evidence. If Mr. Bouchard will agree I have two

(Testimony of James L. Staten.)

photostatic copies here of two pages, which I am going to talk about.

May I have these marked Respondent's Exhibits next in line for identification?

The Clerk: Exhibits U and V.

(The documents heretofore referred to were marked Respondent's Exhibits U and V, respectively, for identification.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit U for identification and ask you if you can identify this——

Mr. Bouchard: Just a moment. The question is leading at that place. I suggest you can just ask him if he can identify it without telling him what it is.

The Court: Do you know what that is a photostat of?

The Witness: Well, only from the conversation that it is part of the account book here.

The Court: It is admitted and stipulated, isn't it, that this is a photostat of a sheet from the book of account?

Mr. Sullivan: That is right, your Honor.

Mr. Bouchard: I suppose that is what it is. It is the first time that I have seen it. I take it that it is a photostat of this sheet. [43]

Mr. Sullivan: Yes, it is.

Q. (By Mr. Sullivan): Can you identify it further?



(Testimony of James L. Staten.)

A. I cannot identify it because it was kept by the public accountant.

Q. If I show you the book, can you identify the book then?      A. I can identify the book, yes.

The Court: What is the book?

The Witness: It is the book the accountant kept for the Beacon Cafe, but I cannot identify anything. I did not keep the books.

Q. (By Mr. Sullivan): Directing your attention to the first item on Exhibit U for identification, at page 30 it shows cash on hand \$2,950.00—did you put that \$2,950.00 cash into the Beacon Cafe?

A. Not myself, no.

Q. Do you know who did?

A. Well, I believe that \$950.00 of it was in the inventory and Jack Baumgardner gave me an additional \$2,000.00.

Q. Now, I show you Exhibit V for identification and ask you if you can identify that?

A. Well, I cannot identify it other than that I know it came from the book there, yes. [44]

Q. You know it came from the book there?

A. Yes.

Q. Appearing here on October 1, 1947, is a journal entry of \$8,818.00—can you identify that—do you have any recollection of that?

A. None at all of that.

Mr. Sullivan: Thank you.

Q. (By Mr. Sullivan): Did you consider yourself the owner or the manager of the Beacon Cafe?

(Testimony of James L. Staten.)

A. I considered myself the owner—at least, the part owner.

Q. But you, yourself, had put no money into it?

A. No money at all.

Q. When you had decisions to make, would you consult with Mr. Baumgardner?

A. Well, not necessarily. I might have on one or two occasions when I first went in there.

Q. Would you consider Mr. Baumgardner the owner?      A. I did at that time.

Q. Did you know Jim Bruno?      A. Yes.

Q. Did Mr. Bruno ever indicate to you that he was the owner of the Beacon Cafe?

A. At one time, yes. [45]

Q. He did?      A. Yes.

Q. Will you tell the Court how he indicated to you that he was the owner?

A. Well, I had been in the Beacon Cafe, I guess about—I am guessing about this now—I had been there probably three or four months and the place when I took it over was quite run down, and there were a lot of changes to be made and I was spending a lot of money and I had gone to Jack or he had come in there—anyway, it was about some minor changes and he said, “Well, go ahead,” and I did.

Q. By “Jack,” you mean——

The Court: Mr. Baumgardner?

The Witness: Yes. And after three or four months had passed, I went to him about a considerable amount to be paid. I had to tear a staircase

(Testimony of James L. Staten.)

out of the front and it involved a good bit of money.

I said to Jack, "Is it OK to do it?"

And he said, "I don't have anything to do with it. Jim Bruno owns the place."

I said, "I thought you owned it."

Q. (By Mr. Sullivan): My question was, did Jim Bruno ever indicate to you that he owned it?

A. Well, a few days after that, Jack brought Jim Bruno [46] in and I said, "Well, what do you want to do about it?"

He said, "You are running it. You have got the money, spend it," and I was in there more or less on my own.

I think there was only one more occasion that Jim Bruno ever came into the place.

Q. Did you discuss profits or losses with Mr. Baumgardner?

A. Yes, I think at that time, or it might have been later, why, as the place wasn't going any good, and he asked me if I wanted to buy out his interest as I had agreed when I went in there, I was supposed to get half of the place and put it in my name and at any time I could buy out the other half.

And I hadn't been there too long when I found it was a losing proposition and I said, "When my year is up, I do not want to have anything more to do with the place."

Q. You considered you had a gift of a half interest?

A. A gift of a half interest, should I decide to buy the other half.

Q. The gift of the half interest was contingent on your buying the other half?

(Testimony of James L. Staten.)

A. That is right.

Q. How long did you manage the Beacon Cafe?

A. One year to date.

Q. Then what happened to your interest [47] in it?

A. Well, two or three days before the 1st of October, why, Andy Lococo came in, said "I am buying out your interest," or buying the cafe. I don't remember which he said, but he said "I am buying you out."

And I said, "Well, have you talked it over with Jim?" And he said "Yes," and I said "That is good enough for me," because at that particular time we were not on too good speaking terms.

Q. He did not ask you if he could buy your interest out?

A. No, he said he was buying it out.

Q. He told you he was buying it?

A. Yes.

Q. Were you paid anything for the sale of your interest to Mr. Lococo?

A. Not a cent. That is why I did not recognize that other escrow paper because I had nothing to do with it.

Mr. Sullivan: May I have this marked as Respondent's Exhibit next in order?

The Clerk: W.

(The document above referred to was marked Respondent's Exhibit W for identification.)

(Testimony of James L. Staten.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit W which has been marked for identification, which purports to be a photostat [48] of an escrow statement and I ask you if you can identify that?

A. Well, I don't recall. I thought I had signed the one. My signature isn't on the same place, but it is an escrow paper, but I don't know if I have seen it before. I probably have, but I am not sure. I signed the final escrow paper.

Q. Does that reflect the sale of your share of the Beacon Cafe to Mr. Lococo?

A. Well, I am quite sure it does, like I say, I know that I have signed the one for the final sale, I had to.

Mr. Bouchard: Let me see it, please.

Mr. Sullivan: Pardon me.

Mr. Sullivan: At this time, I offer Respondent's Exhibit W for identification into evidence.

Mr. Bouchard: No objection.

The Court: Admitted.

The Clerk: Exhibit W.

(The document heretofore marked Respondent's Exhibit W, was received in evidence.)

Q. (By Mr. Sullivan): How long did you manage the Beacon Cafe, Mr. Staten?

A. One year.

Q. Did you report the Beacon Cafe on your individual [49] tax return?

(Testimony of James L. Staten.)

A. Well, I think so. I don't know—in fact, I am quite sure I did. I can check on it.

Mr. Sullivan: Will you mark this document as Respondent's Exhibit next in order, for identification?

The Clerk: X.

(The document above referred to was marked Respondent's Exhibit X for identification.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit X for identification and ask you if you can identify that?

A. Well, I am sure this is the amount—I would have to check this, but I am sure that is the receipt I got for the money when I took it over to the escrow. \$5,760.00 is the figure and I am sure it corresponds to the other.

Q. That is the money you testified Mr. Baumgardner gave to you? A. I am sure it is.

Mr. Sullivan: At this time, I offer Respondent's Exhibit X marked for identification, in evidence.

Mr. Bouchard: No objection.

The Court: Admitted.

The Clerk: Exhibit X.

(The document above referred to as Respondent's Exhibit X was received in evidence.) [50]

Mr. Sullivan: That is all of this witness. Cross-examine, Mr. Bouchard.

Mr. Bouchard: No cross-examination.

(Testimony of James L. Staten.)

The Witness: Am I excused now?

The Court: Yes.

The Witness: Thank you.

Mr. Sullivan: Just a moment, please.

The Court: Maybe there are a few more questions for you.

Mr. Sullivan: That is all. Thank you, Mr. Staten.

The Court: You are excused.

(Witness excused.)

The Court: We will recess until 2:00 o'clock this afternoon.

(Whereupon, at 12:20 p.m., a recess was taken until 2:00 p.m. of the same day.) [51]

Afternoon Session, 2:10 P.M.

The Clerk: The Court will be in session.

Mr. Sullivan: Your Honor, at this time I would like to apprise the Court that the evidence introduced this morning indicates that there is an increased deficiency in one year and I would like permission to amend the answer to conform to the proof and I would like to submit a written amendment tomorrow.

The Court: I will pass on that when you get your amendment ready.

Mr. Sullivan: Thank you, your Honor.

Mrs. Majorell.

The Clerk: Will you tell us your name, please?

Mrs. Majorell: Melanie Majorell.

Whereupon,

MELANIE MAJORELL

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sullivan:

Q. Mrs. Majorell, where do you live?

A. 3001 Hollyridge Drive in Los Angeles.

Q. What is your profession?

A. I am an attorney at law. [52]

Q. Are you here in answer to a subpoena duces tecum directing you to bring certain documents?

A. Yes, sir, I am.

Q. Have you brought those documents?

A. I have.

Q. Do those documents relate to an escrow of the Beacon Cafe? A. In part.

Q. Did you handle the escrow of the Beacon Cafe that was completed on January 10, 1947?

A. Yes, sir.

Mr. Sullivan: May I have this marked as Respondent's Exhibit next in order?

The Clerk: Y for identification, sir.

(The document above referred to was marked Respondent's Exhibit Y for identification.)

Mr. Sullivan: And this other one, also.

The Clerk: And Z for identification.



(Testimony of Melanie Majorell.)

(The document above referred to was marked Respondent's Exhibit Z for identification.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit Y for identification and——

Mr. Bouchard: What is that, Mr. Sullivan?

Mr. Sullivan: Oh, sorry. [53]

Q. (By Mr. Sullivan): I show you Respondent's Exhibit marked for identification Y, and ask you if you can identify that? A. Yes, I can.

Q. What is it?

A. It is a photostatic copy of the yellow office copy that I have, or had, of the Beacon Cafe escrow, which I handled and which closed on January 10, 1947.

Q. I hand you Respondent's Exhibit Z for identification and ask you if you can identify that?

A. Yes, I can.

Q. What is it?

A. It is a photostatic copy of a yellow office copy that I have and had concerning the Beacon Cafe with notes and figures that I made at the time and they are indicated on it.

And also it contains the signature of Clyde Walker with reference to money that he received at the time that escrow was completed.

Mr. Sullivan: Will you mark this as the Respondent's Exhibit next in order?

Mr. Bouchard: Wait a minute. Are those some new exhibits?

(Testimony of Melanie Majorell.)

Mr. Sullivan: I am having them marked for identification. [54]

The Clerk: AA.

(The document above referred to was marked Respondent's Exhibit AA for identification.)

The Clerk: Will this be all one exhibit?

Mr. Sullivan: No, make that two.

The Clerk: BB and CC.

(The documents above referred to were marked Respondent's Exhibits BB and CC for identification.)

Mr. Sullivan: Mark this one as Respondent's Exhibit next in order, please.

The Clerk: DD.

(The document above referred to was marked Respondent's Exhibit DD for identification.)

Mr. Sullivan: Thank you.

Q. (By Mr. Sullivan): Mrs. Majorell, what was your name at the time you prepared this escrow?

A. Melanie Diamond was my maiden name.

Q. I show you Respondent's Exhibit, AA marked for identification and ask you if you can identify that document, Mrs. Majorell? A. Yes.

Q. What is it?

A. This is the photostatic copy of my Trust Account check showing both the front and reverse of the check issued [55] on November 30, 1946, signed

(Testimony of Melanie Majorell.)

by myself and payable to M. R. Baumgarten for \$32.74.

Q. Can you tell me what that check was in payment of?

A. I do not believe it was in payment of anything. I think my best recollection is that it was a return of balance for moneys paid for deposit—in other words, for overpayment of money that I had received.

Q. You received in connection with what?

A. In connection with the Beacon Cafe.

Q. I show you Respondent's Exhibit marked for identification as BB——

A. Yes.

Q. Can you identify that?

A. Yes.

Q. What is it?

A. I can identify the top sheet which is the photostatic copy of a check, both the front and the reverse side, which I recognize by my signature on the reverse side. It is a check for \$2,500.00.

Q. What was that check in payment of?

A. Well, I can tell you that it was taken by me and deposited and used in connection with the Beacon Cafe escrow for the payment. The same amount was paid out on the same day by me, out of the same Trust Account wherein this check was [56] deposited and paid out as a down payment to the sellers, Mr. Carnes and J. Guelff, deceased.

Q. I now hand you Respondent's Exhibit CC for identification and ask you if you can identify this document?

A. Yes, I can.

Q. What is it?

(Testimony of Melanie Majorell.)

A. I would identify this as being the photostatic copy of a check the same way by reason of the endorsement which bears my name last on it as having been received and applied in the Beacon Cafe as shown.

Q. I hand you Respondent's Exhibit DD for identification and ask you if you can identify that document? A. Yes.

Q. What is it?

A. It is a photostatic copy of a check. I can identify it also only by reason of the endorsement which bears my name last, as having been used in the receipt of moneys to be used in the Beacon Cafe as shown.

Q. Did you prepare another paper in connection with this escrow from an affidavit for Mr. Clyde Walker? A. Affidavit?

Q. Yes. A. No, sir.

Q. Are you sure?

A. You asked me, sir, and the answer is "no." [57]

Mr. Sullivan: May I now have this document marked for identification as Respondent's Exhibit next in order, please?

The Clerk: EE.

(The document above referred to was marked Respondent's Exhibit EE for identification.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit marked for identification EE and ask you if you can identify that? A. Yes.

(Testimony of Melanie Majorell.)

Q. What are these?

A. These are photostatic copies of bank deposit slips for deposit to my Trust Account in 1946. The first one is for the \$2,500.00 dated July 22, 1946, and the second one is November 30, 1946, showing a total of \$11,080.00.

Mr. Sullivan: At this time I would like to offer Respondent's Exhibits AA, BB, CC, DD and EE in evidence, your Honor, also Y and Z.

Mr. Bouchard: Well, I object to the offer of Respondent's Exhibit Z and Respondent's Exhibit Y on the ground that they are hearsay and photostatic copies of the notes of an attorney's office, which are hearsay and do not refer to the Petitioner in this case at all.

Mr. Sullivan: Your Honor, these are notes—photostatic copies of the notes that the witness has been referring [58] to and the notes of the escrow that have to do with these checks. If your Honor will examine them——

Mr. Bouchard: I make no objection to any other exhibits excepting those stated.

Mr. Sullivan: Those exhibits have to do with the Petitioner in this case.

Mr. Bouchard: The two exhibits which the Court is looking at, do not refer to the Petitioner in this case at all.

Mr. Sullivan: But they do refer to the Petitioner in this case.

The Court: The objection is overruled. As I understand it, they refer to the transaction which

(Testimony of Melanie Majorell.)

was described this morning by the witnesses. They will be admitted.

(The documents heretofore marked Respondent's Exhibits Y, Z, AA, BB, CC, DD and EE, respectively, were received in evidence.)

Mr. Sullivan: That is all. You may cross-examine, Mr. Bouchard.

### Cross-Examination

By Mr. Bouchard:

Q. Mrs. Majorell, how long have you practiced in Hawthorne—I take it that your office is in Hawthorne? A. Yes.

Q. How long have you practiced there? [59]

A. Since 1941.

Q. You do not live in Hawthorne?

A. No, I do not.

Q. Are you acquainted with Mr. Baumgardner?

A. Yes, I am.

Q. How long have you known him?

A. Since shortly after I came to Hawthorne.

That is, to practice law.

Q. During the period that he was chief of police of the City of Hawthorne?

A. He was chief of police there when I came.

Q. Have you ever represented Mr. Baumgardner in any legal matters? A. Yes.

Q. When you represented Mr. Baumgardner, were you employed by Mr. Baumgardner in con-

(Testimony of Melanie Majorell.)

nection with the Beacon Cafe matter? A. No.

Q. Were you the attorney for the executor or the executrix in the Guelff Estate? A. No, sir.

Q. In connection with the purchase of the interest of the Guelff estate, were you representing Mr. Walker? A. Yes, sir.

Q. You have not represented Mr. Baumgardner in connection [60] with any matter pertaining to the Beacon Cafe? A. No, sir.

Q. Was Mr. Baumgardner ever in your office during the time that the escrows relating to the Beacon Cafe were being created and handled?

A. I am sorry but that I could not remember because it was a period of months and the Beacon Cafe is located in the same big building and my office is one of the offices in the same building, very close, and the Beacon Cafe was also the lunch room, so I would have no way of recollecting it but it is very likely that I did see him in that period.

Q. Some of the exhibits just offered in evidence are checks in which Mr. Baumgardner's name was mentioned as the payee, some of them over your signature. You do not know, do you, whether or not Mr. Baumgardner was acting for any other person in connection with the Beacon Cafe escrows, Mrs. Majorell?

A. I have no knowledge as to the background, other than the actual transfer.

Q. Just whatever the escrows show, that is the extent of your knowledge, is it?

A. As far as he is concerned.

Mr. Bouchard: That is all.

Mr. Sullivan: No further questions.

The Court: All right, thank you, Mrs. Majorell, you [61] are excused.

(Witness excused.)

Mr. Sullivan: Mrs. Strewn, please.

The Clerk: Will you tell us your name?

Mrs. Strewn: Irene Strewn.

Whereupon,

### IRENE STREWN

was called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Sullivan:

Q. Will you spell your last name, please, Mrs. Strewn?      A. S-t-r-e-w-n.

Q. Mrs. Strewn, where do you live?

A. I live in Manhattan Beach.

Q. What is your business or occupation?

A. I am in the accounting business.

Q. Were you in the same business in 1946?

A. Yes, sir.

Q. Directing your attention to the year 1946, did you have occasion to have as one of your clients the Beacon Cafe, Mrs. Strewn?      A. Yes, sir.

Q. Could you please tell the Court how you happened to [62] acquire this client?



(Testimony of Irene Strewn.)

A. My office was next door to a little cafe and the girls were going next door to get coffee. I then met Mr. Baumgardner, and a couple of other gentlemen, and Mr. Baumgardner said, "Just a minute, I have been wanting to talk to you."

So I said, "Yes." So we stepped to one side together and he said, "I have advanced" or "loaned"—I am not sure of the exact words, either "advanced" or "loaned money to Clyde Walker, and I have not been able to get any of it back."

And he said, "I think it is the people who are doing his books, and I was wondering if I could get him to give the work over to you. Perhaps if he did that, I would get some of my money back."

Well, I was very elated because it was a pretty good-sized cafe, and I said, "I will be glad to."

Q. I want to show you Respondent's Exhibit U which has been marked for identification and I ask you if you recognize this?

Now, it is stipulated between counsel that that is a photostat of a page of this ledger here (indicating).

A. I think this came from not the first of the Beacon books—well, I am not sure, but I think this was the second set of books of the Beacon. [63]

Q. Is that your handwriting there?

A. Yes.

Q. I show you Respondent's Exhibit V for identification and ask you if you can identify that?

A. Well, that isn't my handwriting here at the bottom and I wouldn't know. There was a couple of

(Testimony of Irene Strewn.)

sets of books and I would not know what this was from. Oh, Staten, I am sorry, yes, this would be from Mr. Staten's book. It says it right here.

Q. And what does this purport to be—could you explain it to us?

A. I am sorry that I cannot explain it better but there was a former set of books. Mr. Walker brought his books to me and the accountant that had them at that time only had some work sheets and no books, and I think his books were set up from these work sheets and these were journals that were left in Mr. Walker's set of books.

This journal was taken from the former book, so these are not the originals. There is a set of books previous to that.

Q. I direct your attention to the second entry on here, September 30 set up, assets left from previous half interest, that came from Mr. Walker's books?

A. That came from Mr. Walker's books.

Q. I direct your attention to the third entry, the [64] set-up investment inventory half interest from escrow statement.

A. This was a journal made in September and it would have been wrong because the escrow did not come from the bank until six months later. This entry was made at least six months before the escrow paper.

Q. Directing your attention to Respondent's Exhibit V for identification, does this show the capital account and the investment in business?

(Testimony of Irene Strewn.)

A. Well, it is supposed to, but these journals came from a previous set of books and I do not have them and I don't know what Mr. Walker did with them.

Mr. Sullivan: At this time I would like to offer Respondent's Exhibits U and V for identification in evidence, your Honor.

Mr. Bouchard: I have to object to them as having no materiality and they do not seem to bear on any issue in the case.

The Court: What is the purpose of these?

Mr. Sullivan: These are from the books of the Beacon Cafe. Mrs. Strewn testified that she kept the books and they show the capital account and one of the issues in this case is who owns the Beacon Cafe and what investment was in it.

The Court: Is there any way to connect the [65] Petitioners with these sheets? I take it that they are sheets from the books of the Beacon Cafe?

Mr. Sullivan: Yes, sir. Rather than put in the big ledger here, I had those photostated and we have had testimony that the Petitioners had money go into the Beacon Cafe and this is the capital account of the Beacon Cafe.

Mr. Bouchard: It doesn't tie up with the Petitioners in any way.

The Court: Well, you might be able to make some tie in there. The objection is overruled. It will be admitted.

The Clerk: U and V in evidence.

(Testimony of Irene Strewn.)

(The documents heretofore marked Respondent's Exhibits U and V, respectively, were received in evidence.)

Q. (By Mr. Sullivan): And for what period of time, Mrs. Strewn, did you keep the books of the Beacon Cafe?

A. Well, I don't remember. I kept them for Mr. Walker, as I say, that was the books before these that you are looking at, the original set of books and then when Mr. Staten came in and I kept them for Mr. Staten until he went out, but I could not tell you about the period of time.

You have the books. You should be able to tell by the entries of the books, the time. [66]

Q. You stayed until Mr. Staten sold his interest, did you? A. Yes, until he went out.

Mr. Sullivan: That will be all, Mrs. Strewn, thank you.

Just a minute, Mr. Bouchard might want to cross-examine.

Mr. Bouchard: Yes, I do.

### Cross-Examination

By Mr. Bouchard:

Q. Mrs. Strewn, you testified that Mr. Baumgardner met you on the street and said that he would like to have you take a look at the Beacon Cafe books that he had? A. Yes.

(Testimony of Irene Strewn.)

Q. Who actually hired you?

A. Mr. Walker.

Q. Mr. Walker actually hired you?

A. Yes.

Q. To do the work? A. Yes, a month later.

Q. Did he come to your office to employ you?

A. Yes.

Q. And you then went to work for Mr. Walker in taking care of the books? A. Yes. [67]

Q. Do I understand your testimony correctly that when you started to take care of these books for Mr. Walker, he did not have any prior records?

A. Just a few sheets of paper were all that I could find.

Q. And in setting up the books for Mr. Walker, you did not have very much to work on, did you?

A. No, I have to admit I was inexperienced and I took Mr. Walker's word for it.

Q. Whatever entries you set up on the books, you obtained from Mr. Walker or were based on what Mr. Walker had told you?

A. That is right.

Q. Now, did you prepare the income tax returns from Beacon Cafe—for the Beacon Cafe for any of the years?

A. No, the Beacon Cafe returns—the income tax return was made for the individuals and there is another error, the income and the outgo and the losses were deducted by Mr. Walker on his return while he was there and Mr. Staten took them for the amount of time that he was at the Beacon Cafe.

(Testimony of Irene Strewn.)

Q. At the time Mr. Walker was there, he accounted in his return for all of the profits and all of the expenses, did he? A. That is right.

Q. And when Mr. Staten was there, he reported on his [68] individual return all the profits and all the expenses, is that right? A. That is right.

Q. You did not file for the Beacon Cafe the partnership return, did you? A. No.

Mr. Bouchard: That is all.

Mr. Sullivan: Can I have Exhibits U and T, please, Mr. Clerk?

Mr. Bouchard: One more question, please.

Q. (By Mr. Bouchard): Anywhere on the books of the Beacon Cafe, does the name of Mr. M. R. Baumgardner or Jack Baumgardner appear?

A. No.

Mr. Bouchard: That is all.

### Redirect Examination

By Mr. Sullivan:

Q. I show you Respondent's Exhibit Z and ask you whether you have previously seen a copy of that?

A. Well, this is the escrow. I told you that was put into the book on September of the year before and in March of the following year, I got this from the escrow. It was put in the book merely from what they told me.

Q. Do the figures on Respondent's Exhibit T appear on Respondent's Exhibit U? [69]

(Testimony of Irene Strewn.)

A. This is the \$7,500.00 here of the license in escrow. Yes, they appear. All but this \$2,500.00 doesn't show. Oh, I see it is over here (indicating).

Q. Yes.

A. But that was six months after the books were set up.

Q. Did you know when you were keeping the books that the Beacon Cafe was a partnership?

A. Well, it was a mystery. I never was able to figure it out. It was certainly set up wrong as far as I was concerned, but I was new in the business then and I made an error, no doubt as I should have made more inquiries but never did.

The Court: How do you know that you made an error, Mrs. Strewn?

The Witness: I took Mr. Walker's word for it. He said an uncle of his owned a part of it and I said, "How did you acquire it?" And he said that that was his business.

I took it from Mr. Walker. I didn't know what they paid for it. Mr. Walker told me what the fixtures and everything cost.

Mr. Sullivan: Thank you, that will be all.

Mr. Bouchard: That is all.

The Court: Thank you.

(Witness excused.)

Mr. Sullivan: I will call Mr. Adams.

The Clerk: Will you tell us your name, Mr. Witness? [70]

Mr. Adams: Raymond Turner Adams.

Whereupon,

RAYMOND TURNER ADAMS

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sullivan:

Q. Have you ever used any aliases—any other names, other than Raymond Turner Adams?

A. Yes, sir.

The Court: Try to speak as loudly as you can so that everybody will hear you.

The Witness: Yes, sir.

Q. (By Mr. Sullivan): Do you remember any of them?

A. Yes, I use Roy Miller and Ray Miller.

Q. Do you know the Petitioner in this case, Mr. Baumgardner?

A. Yes.

Q. Have you had any business dealings with Mr. Baumgardner?

A. Yes, sir.

Q. Would you relate to the Court the nature of these transactions you had with Mr. Baumgardner, giving the dates and [71] places as closely as you can, and not repeating any conversation excepting that which was made in the presence of Mr. Baumgardner?

A. Well, I had association with Mr. Baumgardner when I received my taxicab permit. I had association with Mr. Baumgardner when there was a



(Testimony of Raymond Turner Adams.)

proposition regarding a deal of a house of ill-repute at one time.

Q. Will you explain what dealings you had with Mr. Baumgardner in respect to the house of ill-repute in Hawthorne?

A. Well, when I was working for City Cab, well, my boss, Carl Ganatta, at that time he came to me with a deal to make contact with Mr. Baumgardner for the arrangement of a pay-off to operate a house under protective custody and that was in the early spring of 1948, around about May.

It was about that time, but I don't remember the date and Carl took me over behind the police station to a cafe which was next door. Mr. Baumgardner was there at that time early in the morning and Carl told him there was somebody else operating and Mr. Baumgardner said he would find out who it was some day.

And Mr. Baumgardner paid for the coffee for all of us and we went out to the alley behind the police station and Mr. Baumgardner said to us, "What is it you want?"

And Carl said, "Well, I brought Mr. Rae over here to [72] talk about this deal," so Mr. Baumgardner and Carl and I proceeded in and Mr. Baumgardner said to Carl, "What did I tell you?"

And Carl said, "You told me 10 per cent for the policeman's welfare fund and \$10.00 a day for you."

Mr. Sullivan: Just relax, Mr. Adams.

The Witness: It has been so long ago, I am a

(Testimony of Raymond Turner Adams.)

little mixed up on it. It is a long time to remember all these things.

Then Mr. Baumgardner says: "Well, a madam gave me that." And he showed us a diamond ring on his finger. "I know what those places can make" and at that point, if I remember right, it was when the conference was over and he said that he would see us at the donkey baseball match.

Q. (By Mr. Sullivan): Did you see Mr. Baumgardner at the donkey baseball game?

A. Yes, sir.

Q. Did you talk with him then?

A. Yes.

Q. Were any arrangements made?

A. No, sir, not at the donkey baseball game.

Q. Who did you go to the donkey baseball game with?

A. Carl Ganatta and Phyllis Miller—her name is Shirley something. [73]

Q. Who is Phyllis Miller?

A. She was one of the girls that was operating with me at that time.

Q. She was a prostitute? A. Yes.

Q. Did you again see Mr. Baumgardner after the donkey baseball game?

A. I never saw Mr. Baumgardner myself again until a later date when I asked him for a cab permit at the Beacon Cafe.

Q. Did you, in fact, operate a house of prostitution in Hawthorne? A. Yes, sir.

Q. Did you make protection payments?

(Testimony of Raymond Turner Adams.)

A. Yes, sir.

Q. Who did you make the payments to?

A. Carl Ganatta.

Q. How much were they?

A. \$300.00 per week.

Q. How many weeks did you make them for?

A. Five weeks.

Q. Were you accompanied on any of these payments by any one?

A. Once by Phyllis Miller.

Q. Did you get protection? [74]

A. Yes, sir.

Q. Do you know whether Mr. Baumgardner got any of these payments?

A. I cannot state that I know that, no.

The Court: What was that answer, "no, sir," or you don't know?

The Witness: Well, no, sir; I don't know. I don't know how to say it, your Honor.

Q. (By Mr. Sullivan): Did Mr. Baumgardner at the time of either when you met behind the police station or at the time of your meeting at the baseball game, indicate that Carl Ganatta was his agent in this business deal?

A. He stated at the baseball game, "I will let you know later, Carl."

Q. Did Carl let you know later?

A. He told me I would have to get a house in Hawthorne and I would have to notify him where the house was and that he would notify Mr. Baumgardner and I would make all payments to him,

(Testimony of Raymond Turner Adams.)

that these were the orders that came from Mr. Baumgardner.

Q. How long did you operate in Hawthorne?

A. The total amount of time?

Q. Yes.

A. Just about six or seven weeks in Hawthorne itself.

Q. Did you have the house operating [75] openly?

A. It was wide open for anybody that wanted to come.

Q. For the whole six or seven weeks?

A. No, sir; for the period of five weeks—two weeks I operated on the telephone system out of the house there but the five weeks it was open to all cabs and bell-boys who directed the traffic there.

Q. Have you ever been convicted of a felony, Mr. Adams?      A. Yes, sir.

Q. Did you serve time in prison?

A. Yes, sir.

Q. When did you get out?      A. 1951.

Q. Have you been in trouble since then?

A. No, sir.

Q. Do you have any reason to dislike Mr. Baumgardner, Mr. Adams?      A. No, sir.

Mr. Sullivan: Thank you, Mr. Adams, that will be all.

(Testimony of Raymond Turner Adams.)

Cross-Examination

By Mr. Bouchard:

Q. Mr. Adams, are you married?

A. Yes, sir.

Q. Do you have any children? [76]

A. Yes, sir.

Q. When were you married—strike that, please.

Were you married in 1948 and 1949?

A. Yes, sir.

Q. Did you have children then?

A. Yes, sir.

Q. Where were you living? A. Hawthorne.

Q. What was your business?

A. City cab driver.

Q. How long had you been a city cab driver?

A. About three years.

Q. All that time in the City of Hawthorne?

A. No, sir; I was two and a half years in Hawthorne.

Q. Was your license at any time picked up?

A. My license was picked up.

Q. Your permit to drive a car? A. Yes.

Q. When was that done?

A. In 1948, I believe it was, sir.

Q. Was it before the conversations that you stated you had with Mr. Baumgardner in the alley of the police station, Mr. Adams?

A. It was about six months later, sir.

Q. Was your license to drive picked up more

(Testimony of Raymond Turner Adams.)

than once, [77] Mr. Adams?           A. No, sir.

Q. You have been convicted of pimping, have you not?           A. That is right, sir.

Q. And you have pleaded guilty to such charge, have you not?           A. Yes.

Q. And you have served time for such an offence, have you not?           A. Yes.

Q. You said you had no reason to have any ill-feeling towards Mr. Baumgardner, is that right?

A. That is right.

Q. Do you have any reason to like him, particularly, Mr. Adams?           A. Not necessarily.

Q. In your testimony, you seemed to have a little difficulty in remembering?           A. Yes, sir.

Q. And you stated to counsel then questioning you that it was a long time ago and the details were a little hazy, is that right?           A. yes, sir.

Q. Isn't it a fact that you told the same story that you told here today when the Los Angeles County Grand Jury [78] was investigating vice in this area, that you testified to the same thing that you have testified today?           A. Yes, sir.

Q. Do you remember a lawsuit in which a man by the name of Fuller was a party?           A. Yes.

Q. And isn't it a fact that in that litigation you testified to exactly the same thing that you have testified to here today?           A. Yes, sir.

Q. Do you remember the lawsuit in which Mr. Baumgardner sued the Hawthorne Press, a newspaper in Hawthorne, for libel?

A. I remember part of it.

(Testimony of Raymond Turner Adams.)

Q. You testified in that case, did you not?

A. Yes, sir.

Q. And you testified there to exactly the same things you have testified to here, did you not?

A. Yes, sir.

Q. Isn't it a fact that within this last year and the year 1945, you testified in a matter in which Mr. Baumgardner was involved, and testified to exactly the same things you have testified to now?

A. Yes.

Q. That is correct, isn't it? [79] A. Yes.

Q. Now, were you present—strike that. You testified in the Fuller case, didn't you?

A. Yes.

Q. Did you hear Mr. Ganatta's testimony in that case, Mr. Adams? A. No, sir.

Q. Where was the last place that you served your sentence in? A. At Chino Institution.

Q. Where is that? A. Chino, California.

Q. How far is that from Los Angeles?

A. About thirty some miles.

Mr. Sullivan: I object to this, your Honor. I think counsel is going a little far afield. There is no doubt that he had a previous criminal record.

Mr. Bouchard: This is the last question I am going to ask him about that.

Q. (By Mr. Bouchard): Did you know an officer by the name of McGowan who was a police officer in Hawthorne? A. Yes, sir.

Q. Did you know him pretty well?

A. Yes, sir. [80]

(Testimony of Raymond Turner Adams.)

Q. What was his position in the police department, Mr. Adams?      A. Patrolman, I suppose.

Q. Pardon?      A. Patrolman.

Q. Patrolman?      A. Yes.

Q. Was he ever an acting chief?

A. I don't know, sir.

Q. Did he serve in the police department during the time that Mr. Baumgardner was chief?

A. Yes, sir.

Q. Were you paroled from Chino?

A. Yes, sir.

Q. When?      A. 1951.

Q. And didn't you make an affidavit two or three weeks before you received your parole in which you stated substantially some of the things about Mr. Baumgardner that you have stated here?

A. Yes, sir.

Q. And at whose request did you make that?

Mr. Sullivan: I will object, your Honor, I do not see that this is relevant. It doesn't go to the witness' impeachment at all. [81]

The Court: Objection overruled. I don't know where it is going to lead.

Q. (By Mr. Bouchard): Answer the question.

A. By the two State Officers and the acting chief of police of Hawthorne.

Q. What was his name?

A. Carl was his first name. His last name I do not remember. And Officer McGowan—not officer McGowan—



(Testimony of Raymond Turner Adams.)

Q. And what was the occasion for preparing this affidavit?

A. I definitely don't remember except for the Fuller case I suppose.

Q. Isn't it a fact that Officer McGowan came down to Chino and requested that you make such an affidavit?

A. Not Officer McGowan, the acting chief of police of Hawthorne.

Q. Did you give me his name?

A. No, I have forgotten it.

Q. Mr. McGowan was with him? A. Yes.

Q. And Mr. McGowan was in the police department at the same time? A. Yes, sir.

Q. Did you not testify in one of these proceedings that [82] the reason you made this affidavit was because you were up for parole and appeared before the adult authority and if you were asked to give such an affidavit, you were perfectly willing to give it, isn't that true?

A. Yes, sir; I was perfectly willing to give it.

Q. Now, I think you testified that it was some time in May of 1948 that your boss, Mr. Ganatta, came to you and talked to you about the possibility of opening up a house of prostitution; is that right?

A. That is right, sir.

Q. Tell me again just what Mr. Ganatta said to you, Mr. Adams?

A. Mr. Ganatta called and asked me—he knew I was dealing and wheeling in women—and he said,

(Testimony of Raymond Turner Adams.)

“Rae, I have had a contact made and if you don’t operate in Hawthorne, you are not going to operate anywhere.”

Q. Had you ever operated in Hawthorne before?      A. No.

Q. Where did you operate?

A. The Frontier House in Redondo Beach.

Q. Did you live in Redondo Beach?

A. No, I lived at Hawthorne.

Q. Did you ever operate such a house at any place besides Redondo Beach?

A. No, sir. [83]

Q. How long had you operated a house there?

A. This is unusual but may I ask you a question? I misunderstood your question.

Q. You don’t understand?      A. No.

Mr. Bouchard: All right, Miss Reporter, read the question, please.

The Reporter: Yes, sir.

(Question read.)

The Witness: It was the question before that.

Mr. Bouchard: All right, Miss Reporter, read the question before that, please.

The Reporter: Yes, sir.

(Question read.)

The Witness: I operated a house in Hawthorne. I made a mistake in my previous answer.

Q. (By Mr. Bouchard): Prior to May of 1948?

A. No, sir.

(Testimony of Raymond Turner Adams.)

Q. But you had operated a house of prostitution as you said that Mr. Ganatta knew you had been wheeling and dealing in women? A. Yes.

Q. For how long a time had you been doing that? A. About two months. [84]

Q. At Redondo?

A. Redondo Beach Boulevard.

Q. And that was the only place and the only time that you operated such a house?

A. Yes, sir.

Q. That, of course, isn't the only time that you were living off the earnings of women, was it?

A. I wasn't living off their earnings.

Q. You never did live off their earnings?

A. No, sir.

Q. At no time? A. No, sir.

..Q. What was the idea of running these houses of prostitution or wheeling and dealing in women—was it just a hobby with you? A. No, sir.

Q. It was something you did for profit, wasn't it, Mr. Adams? A. That is right.

Q. Let us get back to this conversation with Mr. Ganatta. He told you that you would have to operate a house in Hawthorne or you would be out of business? A. That is right.

Q. Did he say why that was so?

A. He said that Mr. Baumgardner had ordered him to [85] contact, to make contact with me on it.

Q. Did he tell you that Mr. Baumgardner wanted a house of prostitution in Hawthorne?

A. He said he wanted the pay-off.

(Testimony of Raymond Turner Adams.)

Q. Now, you are sure of this testimony, are you?

A. Yes.

Q. That Mr. Ganatta said Mr. Baumgardner told him he wanted you to operate a house of prostitution in Hawthorne because he, Mr. Baumgardner, wanted a pay-off?

A. The pay-off was later.

Q. Well, you tell me what Mr. Ganatta said to you, Mr. Adams.

A. Carl Ganatta told me that Mr. Baumgardner had contacted him, saying that he wanted me to move into Hawthorne or I would not operate any place and he explained to me that I would be crossed off and go to jail. That is the exact wording and at a later date, Mr. Carl Ganatta said that Mr. Baumgardner wanted the pay-off.

Q. Mr. Baumgardner had nothing to do with the operating of the police department in Redondo Beach, had he?

A. No, sir.

Q. Now, you are sure that that conversation that you had with your boss, Mr. Ganatta, was some time in May of 1948, are you?

A. It was a little earlier than that, the conversation [86] requesting me to move in. I quibbled with the idea and did not move in for three weeks.

Q. What held you back?

A. Phyllis Miller.

Q. You mean she did not want you to do it?

A. She did not want me to pay off.

Q. It was prior to May of 1948 then that your boss suggested the operation of this prostitution

(Testimony of Raymond Turner Adams.)

house, was it?           A. Yes.

Q. And you could not get Phyllis Miller immediately to go into the deal with you?

A. She thought the price was too high.

Q. What was the price?

A. Ten per cent and \$10.00 a day to Mr. Baumgardner.

Q. Ten per cent of her earnings?           A. Yes.

Q. So that would only leave her nine per cent of her earnings?           A. That is right.

Q. Weren't you getting something out of her earnings?           A. I got——

Mr. Sullivan: I object to that, your Honor.

The Court: Objection overruled.

Q. (By Mr. Bouchard): Isn't it a fact that when you did make this deal with [87] Phyllis Miller, that you were to get half of her earnings?

A. I was to get fifty per cent of her earnings but I never got it.

Q. That was your arrangement with her?

A. Yes.

Q. That you were to get fifty per cent of her earnings, was it?           A. That is correct.

Q. Now, which did she think was too high, the \$10.00 a day to Mr. Baumgardner or the fifty per cent of her earnings to you?

A. The ten per cent to Mr. Baumgardner and the ten dollars a day.

Q. She did not object to paying you half of the earnings she made, but she did object to paying Mr. Baumgardner?

(Testimony of Raymond Turner Adams.)

A. She would not have had any earnings if it had not been for me.

Q. You are responsible for her earnings?

A. Yes.

Q. For bringing the business to the prostitution house? A. Yes.

Q. So it took you two or three weeks after this suggestion was made by Mr. Ganatta to you before you could sell Phyllis Miller on the idea that that was what you should [88] do? A. Yes.

Q. Was it around May of 1948 that you opened up the house?

A. Yes, for some reason Mrs. Miller changed her mind. An officer had been into the house and talked to her.

Q. You say you opened this house in May of 1948 in Hawthorne? A. Yes.

Q. At what address?

A. I believe it is 139 East 141st Street.

Q. And did you rent the house?

A. Yes, sir.

Q. Who made the arrangements for rental?

A. Phyllis Miller and I and the landlord. We made a lease on the place for a year.

Q. Was the lease in writing? A. Yes.

Q. Did the landlord know what you wanted to do with the place? A. Not exactly.

Q. Did he have any idea?

A. He did at a later date.

Q. It wasn't at a much later date, was it?

A. It was a month or so later, yes, sir. [89]

(Testimony of Raymond Turner Adams.)

Q. So the landlord did not find out about it until you got into difficulties?

A. We did not get into any difficulties.

Q. You did not get into any difficulties?

A. No.

Q. Now, did you and Phyllis Miller go together to the landlord and make this arrangement?

A. Yes, sir.

Q. And the lease was in writing?

A. Yes, sir.

Q. And it was signed by the both of you?

A. Yes, sir.

Q. What was the rental?

A. \$125.00 a month.

Q. And you rented it for a year?

A. Leased it for a year.

Q. Leased it for a year?                      A. Yes.

Q. What about the utilities—did you make any arrangements about these things?                      A. Yes.

Q. Who made those arrangements?

A. Definitely I don't remember.

Q. But anyhow, in May of 1948, you made this lease and you opened this house? [90]

A. Yes, sir.

Q. How many girls did you have working for you, Mr. Adams?

A. When I first opened, I had only one.

Q. And that was Phyllis Miller?                      A. Yes.

Q. And how long did you continue to operate that house, the address of which you have just given me, as a house of prostitution?

(Testimony of Raymond Turner Adams.)

A. About seven weeks.

Q. About seven weeks?           A. Yes.

Q. Now, it was Mr. Ganatta that told you if you wanted to operate a house in Hawthorne you would have to pay ten per cent of the earnings of the house, to go into the police fund and that you would have to pay \$10.00 a day to Mr. Baumgardner?

A. That is correct.

Q. Now, was that the arrangement that was made or was there an arrangement to pay a fixed sum?

A. The arrangement was made when we contacted Mr. Baumgardner to make a fixed sum. I cannot state that Mr. Baumgardner definitely got that money.

Q. I understand that, sir. If any money was paid by you for this purpose in each and every instance, no matter how [91] many or how few, the money was paid to Mr. Ganatta?           A. Yes, sir.

Q. You never paid a dime to Mr. Baumgardner, did you?           A. No, sir.

Q. I think you testified on your direct examination that you made—correct me if I am wrong—

A. Yes, sir.

Q. I think my recollection is that you testified that you made five payments of \$300.00 each to Mr. Ganatta?           A. That is correct.

Q. That would be a total of \$1,500.00?

A. Yes, sir.

Q. Did you get that money from Phyllis Miller?

A. Yes, sir.



(Testimony of Raymond Turner Adams.)

Q. From her earnings? A. Yes, sir.

Q. You say that you continued to operate that house for a period of about six or seven weeks?

A. Yes, sir.

Q. Didn't you pay anything the sixth and seventh weeks? A. No, sir.

Q. At any rate, after six or seven weeks of operation at that location, you moved out, didn't you?

A. Well, we were having quite an issue with the [92] landlord.

Q. Were you having any with the police department, Mr. Adams? A. No.

Q. But you moved out? A. Yes, sir.

Q. And did you continue operations?

A. Yes, sir.

Q. Where?

A. Out of cabs and motels.

Q. Did you have headquarters?

A. City Cab, Hawthorne.

Q. So you gave up operating a house and you ran another kind of service? A. Yes, sir.

Q. Is that what you are—is that what is called the "call house business"? A. Yes, sir.

Q. As a matter of fact, you operated out of a garage, didn't you? A. Yes.

Q. You had the telephone installed in the garage, hadn't you?

A. No, sir; it was already installed.

Q. And you operated out of that garage? [93]

A. Yes, sir.

(Testimony of Raymond Turner Adams.)

Q. Now, when did you first meet Phyllis Miller?

A. 1948.

Q. Had she ever worked before for you?

A. No, sir.

Q. Isn't it a fact that the way you got into this particular deal was that Phyllis Miller was introduced to you through another cab driver and she told you that she wanted to open a house of prostitution but that she would need protection and wanted to see if it could be arranged and if you could arrange it?

A. That was the original way of it.

Q. Pardon?

A. That was the original way of it, yes, sir.

Q. Why did you have trouble with your landlord?

A. Well, he had sold the house and the new owner wanted the house and I had a lease on it and he wanted me to give up the lease suddenly.

Q. Did the prospective purchaser of the house at any time inspect it while you were occupying it, and go through the house?

A. Yes, sir.

Q. Day or night?

A. I don't remember.

Q. Well, did you give up the lease at the landlord's [94] request?

A. After a struggle.

Q. Well, when you gave it up, did the landlord pay you anything for giving it up?

A. I don't remember.

Q. Now, you said something in your testimony about the fact that—could we have a recess, please?

(Testimony of Raymond Turner Adams.)

The Court: Yes, I was just going to suggest that to you.

We will recess now.

(Short recess taken.)

The Clerk: The Court is in session.

The Court: If it is all right with the parties, I would like to run to about a quarter to 5:00 and come back in the morning.

Mr. Bouchard: I know what your Honor's problem is. I was hoping I could get down to the office about a quarter to 5:00. If we could adjourn about 4.30, that would just be fine. This is off the record.

The Court: Off the record.

(Discussion outside the record.)

The Court: Back on the record.

Mr. Bouchard: May I have the last question read, please?

The Reporter: Yes, sir. [95]

(Question read.)

Q. (By Mr. Bouchard): Now, Mr. Adams, I think you testified that this house of prostitution that you operated in Hawthorne with Miss Miller, was open for six or seven weeks, did you not?

A. Yes, sir.

Q. And were you operating as a house of prostitution at that place during all of these six or seven weeks?

A. Yes, sir.

Q. And during that time, was Miss Miller the only inmate of the house?

A. No, sir.

(Testimony of Raymond Turner Adams.)

Q. Who else was there?

A. The maid and at a later date, two other girls were there.

Q. Did the maid engage in acts of prostitution?

A. No, sir.

Q. You say you had two other girls?

A. Yes.

Q. How long a period of time were those two girls there?      A. Three days.

Q. Three days?      A. Yes.

Q. So out of the six or seven weeks that you operated, [96] Miss Miller was the only prostitute in the house except for two or three days, when you had two other girls?      A. Yes, sir.

Q. Were those two other girls there at the beginning of your operation or at the end of it?

A. Yes.

Q. They would be there in the six or seven weeks, is that right?

A. No, they were there about the last of the fifth week.

Q. And you had the two girls for two or three days?      A. Three girls.

Q. Three girls?

A. Well, Phyllis and the other two.

Q. In the last part of the fifth week, Miss Miller was the only prostitute?      A. That is right.

Q. Now, isn't it a fact, Mr. Adams—strike that out, please. I think you testified that the house was open to anybody that wanted to come for the period of time that you occupied it, is that right?

A. That is right.

(Testimony of Raymond Turner Adams.)

Q. So that for that six or seven week period it was open to anybody?

A. Only for the five paid weeks. [97]

Q. Only for the five paid weeks?

A. For the five paid weeks it was open to everyone, that is correct.

Q. Then you stayed on there for two weeks?

A. Yes.

Q. And you lived in it, in the house?

A. Yes.

Q. And no acts of prostitution were committed?

A. No, sir.

Q. And that is when you started to operate the call business? A. Yes, sir.

Q. Now, isn't it a fact that that house was only open for a period of eight days? A. No, sir.

Q. That isn't true? A. No, sir.

Q. Isn't it a fact that after the end of eight days you and Phyllis Miller quit operating that house as a house of prostitution, but you used it as your headquarters and operated in hotels and motels and other places? A. No, sir.

Q. That isn't true? A. No, sir.

Q. Do you remember the last time that you testified in [98] a proceeding involving Mr. Baumgardner, in which you gave similar testimony, do you recall the case—you do, do you not?

A. Yes, sir.

Q. Do you remember being asked these questions and making these answers:

“Q. So during all the five weeks except for those

(Testimony of Raymond Turner Adams.)

two days, Phyllis Miller was the only prostitute in the house, is that right?

“A. Outside of those last two days, eight days of regular operation is all we operated. The rest of the time”——

And then the court said: “What is that?” And your answer was:

“A. We had our doors wide open for eight days, then we got orders to close them.”

Do you remember those questions being asked and you making those answers?

A. Not like that, no, sir.

Q. You don't remember that?

A. Not like that, no, sir.

Q. If you made those answers to those questions were they true or false?

A. They would be false.

Q. Now, I want you to be sure about this. You never [99] testified in any other proceeding, in this last proceeding involving Mr. Baumgardner, you did not testify in answer to a question by the Court, the Judge: “We had our doors wide open for eight days. Then we got orders to close them.”

You don't remember that?

A. I don't remember.

Q. And then the Court said—do you remember him saying this to you: “I thought you said you operated five weeks?”

And you answered, “We did. We operated on the call system after that. We lived in the house itself and operated from that base.”

(Testimony of Raymond Turner Adams.)

And the Court said, "The first eight days you operated in the house."

And your answer was: "Wide open."

And the Court said: "And after the first eight days of this five-week period, then you used a call system?"

And your answer was, "Yes, and worked in motels."

And the Court said: "And the acts of prostitution occurred elsewhere?"

And you answered: "In motels, yes."

Do you remember the Judge asking you those questions and you making those answers?

A. I don't remember that, no, sir.

Q. And if the Judge asked you those questions and you made those answers, they were true, weren't they? [100]

A. Not about the eight days.

Q. They were not? A. No, sir.

Q. You were sitting about as close to the Judge in that case as you are sitting to the Court in this case, were you not? A. That is right, sir.

Q. Now, how often did you and Miss Miller divide up the earnings?

A. Well, normally, we divided each day what I had coming and what she had to—what I had coming and what had to go out.

Q. In other words, at the end of each day, the usual practice was for you to get fifty per cent of what she had taken in? A. I never got it.

Q. You never got it?

(Testimony of Raymond Turner Adams.)

A. No, it all went to Mr. Baumgardner.

Q. Didn't you make any money in that house?

A. About \$100.00 clear.

Q. After paying off this \$300.00 a week—was that the figure per week?

A. The payoff, yes, sir.

Q. The payoff was \$300.00 a week?

A. Yes. [101]

Q. So, after you made the payoff, you only had \$100.00 left?

A. We averaged \$100.00 total.

Q. A day?

A. In the whole average.

Q. For six or seven weeks?

A. That is right.

Q. I thought you said it was wide open?

A. It was.

Q. But nobody patronized it?

A. Well, after all, it takes time to establish a place.

Q. How long did it take you to establish this place, Mr. Adams?

A. Well, the cab trade just about under four weeks.

Q. About four weeks?

A. Yes, sir.

Q. Well, if it is a fact that you only operated eight days wide open, you did not do very well in those eight days, did you?

A. We did not quite make the tab.

Q. When did you last see Miss Miller?

A. I saw her today.

Q. Today?

A. Yes. [102]

Q. Where did you see her?

A. In the hall.



(Testimony of Raymond Turner Adams.)

Q. Outside this courtroom? A. Yes, sir.

Q. Did she tell you that she had been subpoenaed as a witness? A. Yes, sir.

Q. What was her condition when you saw her?

A. Well, she was pretty happy.

Q. Do you mean by that she was pretty high?

A. I would say she had been having a few drinks.

Mr. Sullivan: Your Honor, we subpoenaed Miss Miller and we sent her home. She wasn't in a condition to testify.

Q. (By Mr. Bouchard): Mr. Adams, you are pretty well acquainted with the City of Hawthorne, aren't you? A. Yes.

Q. You know the layout of the streets?

A. Fairly well.

Q. Was this house that you operated with Miss Miller in a respectable neighborhood?

A. Oh, yes.

Q. I think you testified that you appeared as a witness—you were subpoenaed by the Hawthorne Press as a witness in the [103] libel case which Mr. Baumgardner started against them?

A. I don't remember.

Q. You do remember that you testified in that case, don't you? A. I don't remember.

Q. You don't remember that you testified in that case, Mr. Adams?

A. I don't remember which one it was.

Q. Do you remember in the last case involving Mr. Baumgardner when you testified on this sub-

(Testimony of Raymond Turner Adams.)

ject, that you were asked these questions and made these answers:

“Q. And you appeared as a witness for the Hawthorne Press in that case, did you not?

“A. I was subpoenaed as a witness, yes.

“Q. And you appeared as a witness?

“A. Naturally.

“Q. And you testified? A. Yes, sir.”

Do you recall those questions and answers?

A. No, sir.

Q. Now, isn't it a fact that within about eight days after you and Phyllis Miller opened this house in Hawthorne, that the house became “hot” and you were in trouble with the police department?

A. Never had a day of trouble while we were in that [104] house in Hawthorne.

Q. Weren't you told to close your doors?

A. On the fifth week.

Q. Who told you to do that?

A. Carl Ganatta.

Q. I thought you testified a few minutes ago that the reason you closed the doors was because the landlord wanted to terminate the lease?

A. No, sir, I said we moved.

Q. Then you did not give up the house because the landlord wanted you to?

A. I gave up the house because Carl Ganatta wanted me to.

Q. Mr. Ganatta wasn't the landlord, was he?

A. No.

Q. But Mr. Ganatta told you to close up?

(Testimony of Raymond Turner Adams.)

A. Yes.

Q. Didn't Mr. Ganatta tell you that the house was "hot"? A. Yes, sir.

Q. And isn't it a fact that you were tipped off by somebody, other than Mr. Ganatta, that it was "hot"? A. No, sir.

Q. Isn't it a fact that Officer McGowan tipped you off that it was "hot"? A. No. [105]

Q. Do you recall, for a portion of the time, in the latter part of 1950 and the early part of 1951, that Mr. Baumgardner wasn't connected with the police department—do you know that from civil procedure? A. I don't know.

Q. You know he wasn't chief of police during that period of time? A. I don't know that.

Q. You don't know that?

A. I don't know.

Q. You know that Mr. McGowan was on the police department, do you not? A. Yes.

Q. And do you know that some time in 1951 Mr. Baumgardner was reinstated as chief of police, do you not? A. Yes, sir.

Q. And you also know that immediately after Mr. Baumgardner's reinstatement as chief of police, Mr. McGowan left the police department in Hawthorne?

A. I don't know whether he left or not.

Q. Do you know where he is now?

A. No, sir.

Q. Is he in Hawthorne?

A. I don't know, sir.

(Testimony of Raymond Turner Adams.)

Q. You haven't seen him? [106]

A. No, sir.

Q. Did Mr. Baumgardner, while he was chief of police, have occasion to pick up your license to drive a cab in Hawthorne? A. Yes, sir.

Q. Did he give you any reason as to why he picked it up?

A. He said I did not come back for the renewal.

Q. Did he tell you anything else?

A. No, sir.

Q. Did he say the reason he picked up your license was because you had falsified your application? A. No, sir.

Mr. Bouchard: I am pretty near through, your Honor.

Q. (By Mr. Bouchard): In the last case in which Mr. Baumgardner was involved, and in which you appeared as a witness, did you hear the testimony of Phyllis Miller?

A. No, sir, I left after I finished as a witness.

Q. You left after you finished as a witness, so you did not hear her testimony? A. No, sir.

Q. In your preparation to appear here, as a witness, today, have you talked to anybody about this case? [107]

A. I have only seen the special agent who handled the summons and that is all.

Q. That is Mr. Vitello sitting here?

A. No, sir.

Q. Who was it? A. I don't know.

(Testimony of Raymond Turner Adams.)

Q. Did you talk to Mr. Sullivan or Mr. Vitello about your testimony here today?

A. I haven't talked to anyone about any testimony here today.

Q. Did you talk to any agent of the Government?  
A. No, sir.

Q. Now, in this so-called payoff that you have been talking about, the \$300.00 a week, which I think you said amounted in total to \$1,500.00.

A. Yes, sir.

Q. Half of that was paid by Phyllis Miller and half of it by you, is that correct?

A. Except the last part.

Q. Pardon?  
A. Except the last part.

Q. Which part did you pay?

A. The last week I paid it myself.

Q. To Mr. Ganatta?

A. That is correct. [108]

Mr. Bouchard: Excuse me just a minute, your Honor.

You may have your witness.

Mr. Sullivan: No questions.

The Court: That is all, Mr. Adams, thank you.

(Witness excused.)

Mr. Sullivan: At this time, your Honor, I would like to have these documents marked for identification as Respondent's Exhibits next in order.

The Clerk: GG, HH, II, JJ and KK have been marked for identification.

(The documents above referred to were marked Respondent's Exhibits GG, HH, II, JJ and KK, respectively, for identification.)

Mr. Sullivan: Do you want to see them?

Mr. Bouchard: I have already seen them.

Mr. Sullivan: Yes.

At this time, your Honor, I would like to offer these exhibits in evidence. Mr. Bouchard agreed to stipulate that they are bank records and they speak for themselves.

The Court: The exhibits may be admitted.

The Clerk: Exhibits GG through KK are admitted in evidence.

(The documents heretofore marked Respondent's Exhibits GG, HH, II, JJ and KK, respectively, were received in evidence.)

Mr. Sullivan: Mr. Bouchard has agreed to stipulate [109] that in 1946 Mr. Baumgardner loaned Mr. Gibson \$6,500.00 and received \$6,900.00 and the note was received in 1946; is that correct?

Mr. Bouchard: Just a second.

Mr. Sullivan: The stipulation is that Mr. Baumgardner loaned Mr. Gibson \$6,500.00 and received back \$6,900.00 in 1946.

Mr. Bouchard: And when did he make the loan—1945, and in 1946 he received \$6,900.00. So stipulated.

Mr. Sullivan: Right.

Mr. Vitello.

The Clerk: Tell us your name, please.

Mr. Vitello: Charles Vitello.

Whereupon,

CHARLES VITELLO

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sullivan:

Q. Mr. Vitello, what is your business or occupation?

A. I have been a special agent of the intelligence division of the Internal Revenue division, Los Angeles County section, since January of 1946.

Q. And as a special agent of the intelligence division [110] of the Internal Revenue Division, what work—what are your principal duties?

A. To make income tax investigations, to determine whether or not the taxpayers are conforming to Internal Revenue laws, to determine whether taxpayers are violating Internal Revenue laws, and to accumulate the evidence to sustain prosecution.

Q. Were the tax returns of Mr. and Mrs. Milford R. Baumgardner assigned to you for investigation? A. Yes, sir, in April, 1952.

Q. And when did you first meet the taxpayers?

A. I met Mr. Baumgardner on August 11, 1952, at the Hawthorne police department.

Mr. Bouchard: Was that August?

The Witness: August 11, 1952, at the Hawthorne police station.

Q. (By Mr. Sullivan): Will you tell the Court

(Testimony of Charles Vitello.)

what happened in this matter?      A. Yes, sir.

Mr. Bouchard: Just a moment. The witness appears to be testifying from something and there is no showing that he needs that. I think he should be able to testify without notes.

The Witness: We talked about a number of subjects [111] and I would not be able to testify without my notes.

Q. (By Mr. Sullivan): Did you make notes at the time of this meeting or directly thereafter?

A. Yes.

Q. Are those the notes you have with you?

A. Yes.

The Court: He has no recollection of the evidence without reference to his notes?

Mr. Sullivan: I don't think so.

The Court: Is that right, you have no recollection of the evidence without reference to your notes?

The Witness: I would only be able to recall very minor details. I would not be able to cover all the ground that we talked about without my notes.

The Court: Will these notes refresh your memory, Mr. Vitello?

The Witness: Yes.

Mr. Bouchard: If they have to refresh it as to specific questions, not as to the history of the world——

The Court: Well, Mr. Bouchard, what is your objection?

Mr. Bouchard: My objection is that he cannot use his notes unless he needs them to refresh his



(Testimony of Charles Vitello.)

recollection and it has got to be with respect to a particular question. He [112] said, "I cannot cover enough ground unless I do it," and——

The Court: I think that is a good objection.

Mr. Sullivan: However, as to the question I asked—I asked him what happened in the matter——

Q. (By Mr. Sullivan): Will you tell us what happened, Mr. Vitello, without reference to your notes?

A. I introduced myself to Mr. Baumgardner and showed him my credentials and I told him that I had his income tax returns for assignment for investigation and—shall I proceed now to go into what we talked about?

Q. Yes, please.

A. I asked him what records he had pertaining to his income that was reported on the tax return and he said he had none.

I asked him who prepared his returns and he told me that Mr. Ludolph prepared them and he gave me his address at the time, and then I asked him if the returns which I then had in my possession were his returns, and he said they were his returns.

I think I had the 1946, 1947 both for Mr. and Mrs. Baumgardner and the 1948, 1949 and 1950 returns in my possession. Mr. Baumgardner said they were returns for himself and his wife.

I asked him about the source of commission income [113] on his return reported on the 1947, 1948 and 1949 returns, I believe in 1947, he showed \$2,000.00, 1948 \$3,000.00 and I believe in 1949,

(Testimony of Charles Vitello.)

\$6,000.00 commission income and his answer to that was he would be afraid to tell me because if he told me, he would lose his job and refused to tell me the source of that income.

Then we talked about some of his personal background. He was born in 1903 in Oklahoma and he married in 1926 and he had two children, then, both under twenty-one years of age and he said he had a pauper education.

And that prior to coming to California, he had worked for a transfer company for five or six years and worked for a grecery firm for one year and worked as a motion picture operator for several years. Then he came to California about 1924 or 1925 and joined the Hawthorne police force in 1925, I believe, and he had been there ever since, at that time, when he—at that time except for a few short periods—when he was either relieved from his duties or he wasn't acting as a member of the police department.

I believe he said he became chief in 1937. I asked him if his wife had any income during her marriage and he said, no, she never had any source of income excepting for a few years when she operated Milady's Dress Shop. And Mr. Baumgardner said the records of that firm were kept by Irene [114] Strewn.

Q. Did you ask him if he had any non-taxable income, Mr. Vitello?

Mr. Bouchard: Objected to as leading.

The Witness: I asked him——

(Testimony of Charles Vitello.)

The Court: Objection overruled.

The Witness: I asked him if all of his income was returned on his tax returns and he said, "yes." I asked him if he had omitted any income and he said "no." I asked him if he had any assets in the name of nominees or other people and Mr. Baumgardner said, "No, excepting for cars which I had in the name of my children." I think it was in his daughter's name.

He said he had no interest in any other businesses except those that were shown on the return at the time. He mentioned here he got the cars—I think he had a DeSoto, a Pontiac and a Chrysler over the various years. I asked him if he ever had any cash on hand and he said "no." And then he said, "Just pocket money, about \$100.00."

Q. (By Mr. Sullivan): Did you go into that any further at that time, Mr. Vitello?

A. Pardon?

Q. Did you go into that any further at that time?

A. I asked him if he ever had any cash in a safe deposit box and he said, "No, I never kept my cash in a safe [115] deposit box," or in his home. He said he never inherited any money. He said he never had any gifts.

And then I asked him if I might get some of his personal records and books and he said I could go home and get them from his wife.

(Testimony of Charles Vitello.)

I am sure that we talked about other things but I cannot remember. It is difficult trying to remember as we talked about lots of things at that time and it is difficult trying to remember everything we talked about at that time with reference to the subject matter, without reference to my notes.

Q. You cannot remember anything more without reference to your notes as to this conversation you had? A. That is right.

Mr. Sullivan: Can the witness refer to his notes to refresh his memory as to what was discussed in addition to his testimony?

The Court: Do you object to that, Mr. Bouchard?

Mr. Bouchard: Yes, I object, certainly, and the Court's ruling still stands.

The Court: Well, I will confess that the law on this question of notes taken at the time in question is very hazy in my mind and if we can wait until tomorrow morning, I will take a look at it.

Mr. Sullivan: All right, I will refresh my mind too, [116] your Honor.

Mr. Bouchard: I will have to, too.

The Court: We will recess until 10.00 o'clock tomorrow morning.

(Witness excused.)

(Whereupon, at 4:25 o'clock p.m., Tuesday, November 29, 1955, the hearing in the above-entitled matter was adjourned to Wednesday, November 30, 1955, at 10:00 o'clock a.m.) [117]

## Proceedings

The Clerk: The Court is in session.

Mr. Sullivan: Your Honor, as to the point we were arguing yesterday in the course of the proceeding that Mr. Vitello was using notes to refresh his memory is past recollection revived——

The Court: Revised or revived?

Mr. Sullivan: Revised, your Honor, and on reference to Wigmore, any writing may be used to refresh his recollection, that is, it can be before trial, it is just an aid to the memory and Mr. Vitello doesn't intend to use the notes as past recollection recorded where he is testifying from the notes.

The Court: Of course, he has had all evening to refresh his recollection, so that maybe he could possibly testify without the notes, but I agree that the authority which you have cited and which I have investigated myself, is correct.

Mr. Bouchard: When I did take a look at it in Mr. Tracy's handbook on evidence, he agrees with Wigmore.

The Court: All right, we will proceed.

Mr. Sullivan: Mr. Vitello, please. [120]

Whereupon,

CHARLES VITELLO

called as a witness for and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Sullivan:

Q. In the course of the proceeding yesterday, Mr. Vitello, I believe you were testifying as to the first time you contacted Mr. Baumgardner?

A. That is right.

Q. And the next question was, if I remember correctly, what else did Mr. Baumgardner tell you during this interview?

A. I asked Mr. Baumgardner about how much he spent for living expenses and he said he spent about \$4,500.00 a year from 1945 to date.

Q. Did he go back from 1945?

A. No, we did not go back from 1945. At that particular conference, well, he called his wife and told her I was going up to pick up some records but after I got done with the conference with Mr. Baumgardner, I went to his house and saw Mrs. Baumgardner and she gave me her retained copy of the 1942, 1944 and 1951 income tax returns.

She also gave me some of their personal checks and I believe it was for 1951 and 1952. She said the checks prior [121] to that had been destroyed. I asked her if she did not mind, if she would not

(Testimony of Charles Vitello.)

mind making another search for them for the next time I contacted her so that she would be able to say definitely if they were available. She said that she would.

Then she said she had the income records for Milady's Dress Shop, so she got into her Pontiac and I followed her down in my car and she gave me the records for her business, Milady's Style Shop and then I left her and I presume that she went home.

Q. When did you next see the taxpayers?

A. I next saw Mrs. Baumgardner on September 5, 1952, and I asked her at that time if she had looked for prior tax returns and records. She said that she had but was unable to locate any more.

At that time we talked about some other property they had. She mentioned that they only bought a small amount of War Bonds, \$800.00 or \$900.00 during the war years. She mentioned that—the places where they had bought some of their automobiles.

Mrs. Baumgardner said that she had a third year high school education and that the only income job she ever had was in the operations of Milady's Style Shop and she operated that on a "dare" from her husband, who said that she could not operate a business profitably. [122]

She said she discussed her budget with her husband and they came out with a figure of about \$5,000.00 a year. I asked her how much she spent for food and Mrs. Baumgardner said they spent about \$100.00 a month from 1945 to date. I asked her

(Testimony of Charles Vitello.)

about utilities. She said she spent \$15.00 for two months for light, \$6.00 a month for water, \$8.00 a month for gas, and telephone \$8.00 a month. She said her dry cleaning bill was as large as \$100.00 a month, but currently was running about \$35.00 a month.

She said that she had domestic help once a week. Her clothes amounted to \$25.00 a month and that Mr. Baumgardner paid approximately \$100.00 a month in——

Q. Are you sure that dry cleaning bill was \$100.00 a month; that seems quite high?

A. That is what she said. Perhaps she was talking about the time——

Mr. Bouchard: Just a moment, not “perhaps.”

The Witness: That is what my notes show, laundry and dry cleaning \$100.00 a month. I asked her if she had credit accounts and she said periodically. I asked her with which companies and she said J. B. Fitch, the May Company.

About automobiles, she said that they averaged about \$15.00 per month per car, contributions \$500.00 a year. I asked about vacation and travel and she said that the first time they had a vacation was in 1952. I asked her about insurance [123] expenses and she showed me a number of insurance policies from John Hancock, Prudential.

I asked her about social dues and she mentioned it cost her about \$16.00 a year. I asked her if she had received any gifts and she said no, she had received no major gifts, neither as donee or donor.



(Testimony of Charles Vitello.)

She said that they never filed any financial statement, at least she said that she never filed any financial statement and she said she never saw any large amounts of cash, except pocket money, and then she showed me a bunch of insurance policies——

The Court: You mean other than life insurance?

The Witness: No, these are all life insurance and automobile insurance. Then she showed me a number of Trust Deeds on real estate property wherein the Baumgardners were named as the payee. She showed me some stock certificates from Northrup Aircraft and Kilburn Manufacturing Company.

She mentioned that she had no private accounts receivable, no annuities. Her jewelry was minor, just one ring worth about \$500.00 which she had gotten about ten years ago. She had no furs. Her liabilities consisted of real estate liability of Coast or Great Western Savings, no other liability, no other private loans, excepting real estate loans with the Bank of America.

And then she said that she incurred some expenses for [124] music lessons for her children. That was the substance of that conversation.

Q. (By Mr. Sullivan): When did you next have a conversation with either of the Petitioners?

A. On November 6, 1952, Mr. and Mrs. Baumgardner were in the Hawthorne police station.

Mr. Bouchard: What is that date?

The Witness: November 6, 1952.

(Testimony of Charles Vitello.)

The Witness: And special agent Clarence Turner was with me at this conference.

Q. (By Mr. Sullivan): Did you have a conversation with the Petitioners at this conference?

A. Yes, we discussed some of the real estate transactions. We discussed the commission income account that was reported in 1947, 1948 and 1949 return, and Mr. Baumgardner said some of the commission was derived from the buying and selling of Hawthorne City Bonds, and he could not suggest any way of verifying the transaction.

He had no records. He said that he was permitted to buy Hawthorne City Bonds for an amount, a nominal amount. The remainder of the commission was income which was derived from private investigations about which he could not give any details because if it became known he would lose his job and he [125] said that although he trusted me, he was sure that there was a leak in the Internal Revenue service since his income tax matters were introduced by his opposition during litigation.

Mr. Baumgardner said that the title to the property on 611 Truto Avenue, Hawthorne, California, was taken in his father's and mother's names, but he and Mrs. Baumgardner actually owned the property.

Mr. and Mrs. Baumgardner both stated that they did not inherit any money, any bonds, receive any gifts or any money from anyone except for Trust Deeds to acquire real estate.

(Testimony of Charles Vitello.)

We reviewed a schedule of living expenses that I had prepared from information supplied by Mrs. Baumgardner and I advised Mr. Baumgardner that these were prepared mainly from the information supplied by Mrs. Baumgardner.

Q. May I have—strike that.

Mr. Sullivan: Will you please have this marked for identification as Respondent's Exhibit next in order for identification?

The Clerk: LL for identification.

(The document above referred to was marked Respondent's Exhibit LL for identification.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit LL for identification and ask you if that is the document you are referring to? [126]

A. Yes, sir. This is the document I used in discussing with Mr. and Mrs. Baumgardner that the figures for living expenses on Exhibit LL were primarily figures supplied by Mrs. Baumgardner and that Mr. Baumgardner again said that the estimated living expenses were about \$4,500.00 a year up, \$4,500.00 to \$5,000.00, inclusive, for the years 1945 to 1951, and that that figure included Federal taxes.

I asked them if they could suggest any other expenses and they said they could not and Mr. Baumgardner remarked that, as a result of my questioning, he and his wife reviewed their budget and it came out to about \$5,000.00 a year.

(Testimony of Charles Vitello.)

Then we talked about another schedule that I had prepared, schedule of assets and liabilities for Mr. and Mrs. Baumgardner.

Q. May I have that, please? A. Yes.

Mr. Sullivan: May I have this marked as Respondent's Exhibit next in order for identification?

The Clerk: MM for identification.

(The document above referred to was marked Respondent's Exhibit MM for identification.)

Mr. Sullivan: At this time, your Honor, I would like to offer Exhibit LL for identification into evidence.

Mr. Bouchard: No objection. [127]

The Court: It is admitted.

(The document heretofore marked Respondent's Exhibit LL was received in evidence.)

Mr. Bouchard: Off the record.

The Court: Off the record.

(Discussion outside the record.)

The Court: Back on the record, please.

Q. (By Mr. Sullivan): I show you Respondent's Exhibit marked MM for identification and ask you if that is the document you are referring to? A. Yes, sir, it is.

Q. Would you continue, Mr. Vitello?

A. I advised Mr. and Mrs. Baumgardner that the figures and items shown thereon resulted from my work and that in my files I had documents to show them, from which I derived these figures.

(Testimony of Charles Vitello.)

The first item on the schedule is cash in pocket and I told both Mr. and Mrs. Baumgardner that they had individually and at different times, stated that the only cash they had was a small amount of \$100.00 cash in pocket and for that reason, I put the \$100.00 figure in there.

Mr. Baumgardner said that that wasn't correct because he had some \$8,000.00 to \$10,000.00 in cash which he kept under the rugs in different corners. That he had some [128] money when he came to California from Oklahoma; that he added to it gradually.

Q. Did he say how much?

A. Not at this time. He said he could not recall how much he had when he got married. His wife could not recall either. That, he did not recall. Nor did he recall how much he had on any particular date; that no one else knew about it and that as of that date, November 6, 1952, he had between \$500—between \$400.00 and \$500.00 in cash under a rug.

He said that the largest amount of cash was between \$15,000.00 to \$16,000.00; that he had about \$18,000.00 at about the time he started to build some rental units on West 132nd Street, in Hawthorne.

Q. Did he say at what date he had this \$16,000.00, Mr. Vitello?

A. No, he could not pinpoint as to the date. He said at the time he started to build some rental units on West 132nd Street in 1949 or 1950, with reference to the \$18,000.00, he had \$18,000.00. He

(Testimony of Charles Vitello.)

said that when friends would ask him for a loan of \$300.00 to \$400.00, he would do so from his cash under the corners of the rugs; that the money was kept under the rugs; \$20.00 bills under one corner, \$50.00 bills under another corner and so forth.

Each of the figures were reviewed. I read the figures [129] to the taxpayers in the hundreds and they said that they were substantially correct.

Mr. Baumgardner said that the figure for 391 Cedar Avenue was incorrect and that it wasn't \$6,500.00 but closer to \$3,500.00 and that in 1950 and 1951 tax returns were incorrect in listing the amount at \$6,500.00. Mr. Baumgardner further explained that Mr. Mann borrowed \$3,000.00 from him and repaid a portion of it and the balance was handled through the sale of a piece of property and they agreed that the figure I had on the schedule for that piece of property was about correct, \$4,922.00.

Q. Is that the substance of your conversation on November 6th?

A. No, we talked about others. I told Mr. Baumgardner that I found a savings bank account in the Bank of America, No. 3859 and Mr. Baumgardner remarked that it was a good thing that the Los Angeles Grand Jury did not find out about that account, since he failed to tell them about it and they would probably have accused him of perjury even although the amount was only \$55.00.

They mentioned that they had War Bonds in the safe deposit box. Then I told Mr. and Mrs. Baumgardner that I had planned to type up the schedule

(Testimony of Charles Vitello.)

of assets and liabilities and living expenses and present them to them for their signature.

Mrs. Baumgardner objected because she said that she [130] wasn't familiar with all the details. I told her the signing of the statements would only indicate that at the time the statements were correct to the best of her knowledge and belief and that it did not preclude subsequent corrections.

Mr. Baumgardner agreed and said that he would sign that if his attorney approved, and he further explained that he had discussed the matter with his attorney and his attorney advised him not to sign any statements until he had an opportunity to review them.

Mr. and Mrs. Baumgardner were asked individually if there were any additional assets of liabilities and their answer was "no." I explained to him that these statements would only serve as a basis for whatever actions followed relative to their tax liability. I pointed out to them that neither Mr. or Mrs. Baumgardner was required to sign any statement. In fact, they did not even have to discuss anything with the Government and that they could refuse to talk with us.

Mr. Baumgardner stated that the returns might have some inaccuracies when I told him that the interest income was omitted, but he said that he did not intend to defraud the Government and that he was willing to pay whatever additional tax was determined to be due.

(Testimony of Charles Vitello.)

Mr. Baumgardner then asked if he would receive a clearance from the Internal Revenue service after this investigation [131] was over. I told him the investigation was not the routine investigation and for that reason the period ending 12-31-51, was being examined, so that the Government would not, within a short time, have to conduct another investigation.

Mr. Baumgarden said that he was tired of being investigated as a result of information supplied by his political opponents. Permission was granted to inventory their safe deposit box and Mrs. Baumgardner, Mr. Turner and I went to the Bank of America where we inventoried the safe deposit box.

Q. What did you find there, Mr. Vitello?

A. Principally about \$1,000.00 in War Bonds.

Q. I am a little concerned, you might leave a wrong impression with reference to the Grand Jury matter. Mr. Baumgardner, to your knowledge, was never indicted by any County Grand Jury, was he?

A. No.

Q. Do you recall having another conversation with these taxpayers after November 6, 1952?

A. Yes, on January 2, 1953.

Q. And what transpired at this time?

A. I talked to Mrs. Baumgardner and I had previously borrowed a 1951 income tax return, her retained copy, and I went up for the purpose of returning it so that they could get ready to prepare their 1952 return.



(Testimony of Charles Vitello.)

Q. You talked only with Mrs. Baumgardner then? [132]

A. Only with Mrs. Baumgardner.

Q. Mr. Baumgardner wasn't there?

A. Mr. Baumgardner wasn't there. And this was in the church. I told Mrs. Baumgardner that George Bouchard, attorney, and Mr. Baumgardner wanted me to send him a copy of the financial statement so that he and Mr. Baumgardner could discuss the statements. However, I told Mrs. Baumgardner that I felt these statements were results of my work and without the signatures of Mr. and Mrs. Baumgardner, I did not think it would be fair for me to turn over the results of my work to their attorney, at least without me being present.

Mr. Bouchard refused to discuss the items on the financial statement with Mr. Baumgardner in my presence.

Q. Is that all that transpired there?

A. No, I also told Mrs. Baumgardner that prior to the time that Mr. Bouchard came into the picture, I felt free to discuss any matter which came up with Mr. Baumgardner or with her, but now I felt that Mr. Bouchard had all the arrangements and I told her I would have to get any information from the sources that were available to me.

Mrs. Baumgardner said that she was hesitant to sign the financial statements herself because many of the transactions she heard of for the first time when we discussed the items at the Hawthorne police station with her and her husband. [133]

(Testimony of Charles Vitello.)

She also said particularly the cash explanation of \$18,000.00, that Mr. Baumgardner made. She said she never knew of it before, that she never saw the money. In fact, she doesn't believe her husband was telling the truth about the cash.

To her knowledge, the largest amount of cash that she knew of at one time was about \$1,000.00 but never any amount as large as \$18,000.00. I pointed out a few differences in figures with relation to the cost of 391 Cedar being \$4,922.00 instead of the amount they listed of \$3,750.00 in the tax return and the cost of 443 East 129th Street being the correct figure of \$3,750.00 instead of \$6,500.00 on their 1951 return.

I also suggested that they include all their Trust Deed interest on their 1952 return. Mrs. Baumgardner stated that her husband did considerable gambling, but she did not know all the details. That was the substance of that conversation.

Q. After January 2, 1953, did you have occasion to see either of the Petitioners again?

A. Yes, in the latter part of January, 1953, I had occasion to talk with Mr. Baumgardner in the City Hall. However, we did not discuss business or anything relating to his tax liability.

Q. And after that did you see either of the Petitioners [134] again?

A. Yes, on February 26, 1953. Internal Revenue agent William Kinsella served Mr. Baumgardner with a letter relative to the requirement of the keeping of records at the Hawthorne police station.

(Testimony of Charles Vitello.)

Q. What was the substance of that conversation, Mr. Vitello?

A. Mr. Kinsella served Mr. Baumgardner with a letter relative to the requirement of keeping records. Mr. Baumgardner said that his attorney, George Bouchard, did not want him to sign waiver forms 872 for the year 1949. I told him since the matter was only a civil problem that I would leave the waivers with him and leave a return envelope so that if he and Mrs. Baumgardner should decide to sign the documents, he could forward them to the Government.

I told Mr. Baumgardner that this was my first experience where an attorney refused to sign a waiver relating to a civil matter and that the Government would be obliged to take what necessary action they would have to if they did not get the forms in, in time.

We showed Mr. Baumgardner the information that we had with relation to the cost of the property at 391 Cedar Avenue in Hawthorne. Mr. Mann gave us information about the \$3,000.00 loan that Mr. Baumgardner made to him in 1947 and that repayments of \$100.85 on a monthly basis were made by Mr. [135] Mann to Mr. Baumgardner and that the outstanding balance of the loan of \$1,-399.46 was applied to the purchase of a house and that the correct cost of the house should have been \$4,922.00 instead of \$6,500.00 on their return.

Mr. Baumgardner said he purchased a 1940 Oldsmobile in 1940 for \$1,240.00 and that it was wrecked

(Testimony of Charles Vitello.)

in 1946 and that he purchased a 1946 Oldsmobile thereafter.

I asked Mr. Baumgardner if he had any interest in the Cockatoo, which was owned by Andrew Lococo——

The Court: Interest in what, Mr. Vitello?

The Witness: In the Cockatoo Cafe owned by Andrew Lococo and Mr. Baumgardner said that he had no interest in the business or in any other property not already discussed. We advised—I told Mr. Baumgardner that our information showed that he had an interest in the Embassy Club, a poker club in Gardena, California, and we suggested to him that he report the income from that club properly on his 1952 return and that he should also report the interest dividend, rental and other income on his 1952 tax return.

He said that he would and if necessary, he would ask for an extension of time for filing to be sure that the 1952 return was filed properly.

Then we talked about the Beacon Cafe and Mr. Baumgardner said that any money which was put into the Beacon Cafe was money which belonged to Jim Bruno, who died in 1950. [136] He was a friend of Andy Lococo and came from the same town that Mr. Lococo came from, namely, Milwaukee, Wisconsin.

Mr. Baumgardner said that Mr. Bruno was separated from his wife, who was still living in Milwaukee and that he was now living with a girl

(Testimony of Charles Vitello.)

by the name of Ruth—he didn't know her last name.

Mr. Baumgardner said Mr. Bruno had T.B. Mr. Baumgardner said he did not lose one penny in the Beacon Cafe nor did he receive as much as one penny from the Beacon Cafe at any time. He handled the money for Mr. Bruno and that it was all Mr. Bruno's money and that none was his.

He said that Clyde Walker did not know of Mr. Bruno's interest. He said he led Mr. Walker to believe that he was the interested party because he did not trust Mr. Walker.

Mr. Baumgardner said he had rotary dues of \$8.00 a month and dues for the Eagles of \$14.00 a year. Mr. Baumgardner said that bookmakers were arrested at the Beacon Cafe when Andy Lococo was operating the place, but that he could not remember the last name. He said the Los Angeles County Sheriff's office made the arrest because he was too well known. However, he co-operated with the Sheriff's office.

Mr. Baumgardner said his clothes were given to him by friends and acquaintances. Mr. Baumgardner said he could come to our office any morning except Tuesday, subject to his [137] attorney's approval. That was the substance of that conversation.

Q. Mr. Vitello, did you conduct an investigation into the—to determine the cash on hand that Mr. Baumgardner had at any time?

A. Yes. First of all I went to the Bank of

(Testimony of Charles Vitello.)

America and I transcribed all of Mr. Baumgardner's accounts that I could find. This was the Bank of America in Hawthorne and I made a partial transcript of the early years but I made a more complete transcript of the more current years.

Mr. Sullivan: Will you mark this as Respondent's Exhibit next in order for identification?

The Clerk: NN for identification.

(The document above referred to was marked Respondent's Exhibit NN for identification.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit NN for identification and ask you if that is the document which you have just referred to? A. Yes, sir, it is.

Q. Is that a true transcript of the bank's records, Mr. Vitello?

A. It is a partial transcript of the bank's records. It isn't complete in that I did not list all the details. For [138] example, for some check items I put down twelve checks at less than \$100.00. The deposits are complete and the balances are correct. It is just the check items where I have ten checks of less than \$100.00 for a month.

Q. In those cases you did not list each check?

A. That is right.

Mr. Sullivan: At this time, your Honor, I would like to offer Respondent's Exhibits MM and NN for identification into evidence.

Mr. Bouchard: Well, your Honor wonders why I don't object but it was part of the stipulation that I agreed to counsel's statement that the bank records for this period had been destroyed. I how-

(Testimony of Charles Vitello.)

ever would stipulate that they had been destroyed but I object to it on the ground, of the witness' testimony that it is only a partial and not a complete record.

The Court: But I suppose the important parts of it are the totals which are included?

The Witness: Yes.

Mr. Bouchard: I suppose the important part of it, from the Government's point of view is, but I don't know what else was in the record which would have been of value to the Petitioner, as it is a partial record.

The Court: Your objection is overruled. It will be admitted. [139]

(The document heretofore marked Respondent's Exhibits MM and NN, respectively, were received in evidence.)

The Witness: In addition to making a transcript of the taxpayers' yearly bank account, I examined all of the loan records in the Bank of America relating to the taxpayers and I made a transcript and obtained photostats of the loans and how they were paid.

I made a transcript of the mortgages on the Trust Deeds and the payments that were made by the taxpayer.

Q. (By Mr. Sullivan): Where did you make this?

A. At the Bank of America and there was one entry, Syndicate Mortgage Company on Wilshire

(Testimony of Charles Vitello.)

Boulevard, Los Angeles. Outside of that, except for the discussions with Mr. and Mrs. Baumgardner about cash on hand, that was the major portion of what I did to establish the cash on hand.

I examined Mr. Baumgardner's earlier tax filing records to see what tax returns he filed for the period of 1930 through 1951. I cannot think of anything else that might relate to that question.

Q. In the course of your investigation, Mr. Vitello, did you investigate the leads that were given to you by Mr. Baumgardner as to the ownership of the Beacon Cafe?

A. Yes, I did. I examined all the escrows, Majorell's [140] escrow and the escrows at the Bank of America and I read through each document which was in the file to find out if I could find any reference to James Bruno. I could find no reference to James Bruno in the escrow by Majorell. I could find no reference to James Bruno in the two escrows at the Bank of America.

I examined the liquor licenses and I could find no reference to James Bruno, in any of the liquor licenses.

I examined the property files of the Los Angeles County, California, and the files of the undertakers who buried Mr. Bruno. I examined the income tax return files in the Commissioner's office for Mr. Bruno and I could find no connection between Mr. Bruno and the Beacon Cafe.

Q. In the course of your investigation, Mr.



(Testimony of Charles Vitello.)

Vitello, did you investigate any other leads that the taxpayer might have given you as to cash on hand or beginning net worth?

A. Yes, sir, I went to the City Hall for the City of Hawthorne and I examined the payroll records relating to Mr. Baumgardner and picked out those items that related to Mr. Baumgardner, both as to his wages and as to expenses from 1925 to 1951, inclusive.

I also examined all of the bond records that the City of Hawthorne had, looking for the taxpayers' names or names of their children and I could find none.

I examined the sale of lots which had a tax lien [141] against them, for the taxpayer's name and I could find no sale of lots in the names of the taxpayers or their children.

I examined the Grantor indices for the Los Angeles County. I examined the grantee indices. I examined all the deeds that were recorded for the years 1935 through 1951, inclusive.

I examined all the Trust Deeds. I examined the transcript of a civil file involving Mr. Baumgardner. I examined the prior income tax returns. I examined all the bank records of the Bank of America in Hawthorne for Mr. and Mrs. Baumgardner including loan file, credit files, escrows, ledger sheets, their savings and commercial accounts, all deposit tickets.

Q. Did you find anything that isn't reflected on Exhibit 1-A in evidence in this case?

(Testimony of Charles Vitello.)

A. No, everything I could find is shown there.

Q. Did you find any evidence that Mr. Baumgardner dealt in large cash figures? A. No.

Mr. Sullivan: That is all, Mr. Vitello, thank you.

Mr. Bouchard: Can we take a recess?

The Court: Well, it is all right with me.

(Short recess taken.)

The Clerk: The Court is in session, [142] gentlemen.

### Cross-Examination

By Mr. Bouchard:

Q. Mr. Vitello, you are a special agent of the Bureau of Internal Revenue, are you?

A. Yes.

Q. What are your duties as such?

A. To make tax investigations, accumulate evidence to support civil fraud, criminal fraud, write reports.

Q. Isn't one of your duties also to determine when a case is assigned to you for such an investigation that the facts justify that there should be a recommendation of no fraud or no criminal fraud?

A. Yes, sir.

Q. Is that part of your job? A. Yes.

Q. You have nothing to do with the determining of the income tax liabilities of a taxpayer that you are investigating, do you? A. Yes, I do.

Q. Is it part of your duty as a special agent to determine the propriety of deductions, for example?

(Testimony of Charles Vitello.)

A. We usually have an Internal Revenue agent with us.

Q. It is the duty of the Revenue Agent to determine the tax liability, isn't it?

A. Generally, that is right. [143]

Q. If items of income or items of deductions are involved which your investigation leads you to believe has resulted in the fraud, or wilful evasion of tax, that is where your duties really begin?

A. That is right.

Q. It is the Revenue Agent who determines the civil liability of what the tax should be; that is true, is it not?

A. That is true.

Q. Now, when did you start—first, you have been testifying to some memoranda that is before you?

A. Yes, sir.

Q. May I see your memorandum?

A. All of them?

Q. Yes, I want them all.

A. All right.

Q. Are the documents which you have handed me the documents that you have used in testifying?

A. That is right, sir.

Q. And when were they prepared?

A. At the time of the interview.

Q. When did you start your investigation of this case, Mr. Vitello?

A. It was assigned to me in April of 1952. However, I did not contact Mr. Baumgardner until August of 1952. I had [144] some preliminary field work prior to contacting Mr. Baumgardner.

(Testimony of Charles Vitello.)

Q. What did that field work consist of your doing?

A. I checked the public records, the grantee and grantor lists, checked back against escrow records, loan records, cashier's checks.

Q. Anything else?

A. And talked to a number of people.

Q. Who did you talk to?

A. The buyers and sellers of property, people who had Trust Deeds, how they were paid, officials at the Bank of America at Hawthorne. I think that covers about most of them.

Q. So at the time you first contacted the Baumgardners you had made a pretty thorough investigation of matters that were of public record, is that so?

A. Yes, sir.

Q. And had you seen their transactions at the bank?

A. Yes, sir.

Q. How long a time did it take you to do that?

A. I don't know, three, four or five days, I don't know.

Q. Did you check the Probate files of Los Angeles, Mr. Vitello?

A. Yes, sir, I did for the years 1935 to [145] 1951.

Q. For what purpose?

A. To determine if the Baumgardners had inherited any money and to determine if Bruno left any estate.

Q. Now, with respect to Mr. Baumgardner, in

(Testimony of Charles Vitello.)

determining how he might have inherited any money, how did you do that, Mr. Vitello?

A. I went over the probate files on the third floor of the Hall of Records and I looked up all the estates in the name of Baumgardner. I looked for that name but I could find none.

Q. So, as far as the probate file showed, Mr. Baumgardner did not receive anything from anybody by the name of Baumgardner, is that right?

A. That is right. He also told me he did not receive any inheritance.

Q. I am talking about the investigation that you made of the public records. A. Oh.

Q. Did you try to make a search in the probate office for beneficiaries by the name of Baumgardner?

A. What is that probate index book that you look through? If it is that, then I did. If it isn't, then I did not.

Q. I was going to ask you how you did it. That was for my personal information. I just wondered how you located [146] beneficiaries in the probate office.

A. You would have to get it from some place, of course.

Q. Now, you first contacted the Baumgardners—when did you say? A. August of 1952.

Q. Now, are these documents which you have handed me, Mr. Vitello, all of the documents that you have had before you while you were testifying on direct examination?

(Testimony of Charles Vitello.)

A. Well, I have these other files but I didn't refer to them.

Q. You did not refer to them?

A. No, sir. They refer to a list of exhibits.

Q. Where did you first contact Mr. Baumgardner?  
A. At the Hawthorne police station.

Q. And what did you say to him and what did he say to you?

A. I showed him my credentials and identified myself and told him that I had his tax returns assigned to me for examination.

Q. And did you tell him what your duties as a special agent were?  
A. No, sir.

Q. Why did you emphasize the "No, sir"?

A. For no particular reason. [147]

Q. Pardon?

A. Just, no, sir, with no accent.

Q. Were you afraid to tell him what your particular duty was in connection with the matter?

A. No.

Q. Why didn't you tell him what your duties were, Mr. Vitello?

A. Mr. Baumgardner is a police officer. He said that he had had occasion to talk with Internal Revenue employees before and I was under the impression that he knew what a special agent's job was.

Q. Well, when you investigate a taxpayer when he isn't a police officer and doesn't have any prior experience, do you tell him what your duties are?

(Testimony of Charles Vitello.)

A. Not until I am convinced that the taxpayer is guilty of tax evasion.

Q. Didn't you, at your first meeting with Mr. Baumgardner, tell him you were just making a routine audit of his returns? A. No, sir.

Q. Did you, at that meeting, discuss with Mr. Baumgardner some of the matters you had learned about in your investigation prior to seeing him?

A. No, sir, I did not.

Q. You did not tell him that you had talked to the [148] officials of the bank and that you had seen the transcript of his records? A. No, sir.

Q. You did not tell him that you had examined the public files of the Los Angeles County?

A. No, sir.

Q. Or anything of that sort? A. No, sir.

Q. What did you ask about?

A. I wanted his explanation as to who prepared his tax returns and what information he gave the accountant. I wanted to find out his explanation as to why he did not keep records.

Do you want me to repeat the subject we have just talked about?

Q. Yes.

A. That is going to be rather difficult without the notes.

Q. Well, I have got the notes. Now, you go ahead, Mr. Vitello.

A. I showed him the returns that I had in my possession and I asked him to identify his signature

(Testimony of Charles Vitello.)

on the returns and he acknowledged that they were the returns for himself and his wife.

Q. Right there, let me interrupt you. [149]

A. Yes, sir.

Q. You had with you, as I understood your testimony, the original returns for 1946, 1947, 1948, 1949 and 1950; is that right? A. Yes.

Q. Your assignment was to investigate these returns for the period 1942 to 1951; is that right?

A. I don't recall what my first assignment was.

Q. Well, were those prior years 1942 to 1946—

A. Subsequently they were.

Q. They were subsequently assigned to you?

A. Yes.

Q. Did you ask Mr. Baumgardner—strike that out. There has been offered in evidence by stipulation, copies of the returns that you got from Mr. Baumgardner for the years 1942 and 1944, is that correct? A. And 1951.

Q. And 1951? A. Yes, that is right.

Q. Why did you ask for copies of his returns?

A. Because the Government had destroyed the early returns.

Q. You did not have the originals?

A. That is right.

Q. Why did you ask for the copy of his 1951 return, Mr. [150] Vitello?

A. I wanted to see what kind of income he had reported.

Q. Didn't you have the original return of the Government? A. No, sir.



(Testimony of Charles Vitello.)

Q. You did not have it?           A. No, sir.

Q. It had been filed, hadn't it?

A. Yes, sir, the records show that they were filed at the time.

Q. Now, Mr. Baumgardner willingly gave you his retained copy of the 1942 and 1944 returns?

A. Mrs. Baumgardner, yes.

Q. You first saw him at the police station?

A. Yes.

Q. You asked him for quite a few records, did you not?

A. Yes, all records that he might have.

Q. And he willingly gave them to you?

A. Yes.

Q. And he told you that they were at the house and if you went down, Mrs. Baumgardner would give them to you, is that right?           A. Yes.

Q. And among the other records—strike that out. So Mrs. Baumgardner gave you everything she had, did she, Mr. [151] Vitello?

A. I presume she did.

Q. And very willingly she gave them to you, did she not?           A. That was my impression.

Q. Now, did you examine the safety deposit box of the Baumgardners?

A. Yes, sir, we did.

Q. Who do you mean by "we"?

A. Special agent Clarence Turner was with me at the time.

Q. How did you get into the box?

A. After we finished talking to Mr. Baumgard-

(Testimony of Charles Vitello.)

ner and Mrs Baumgardner in November, 1952, I asked Mr. Baumgardner for permission to inventory the safe deposit box and he said, "Sure, go right ahead."

Q. He permitted you to do that?

A. Yes, so Mrs. Baumgardner, Mr. Turner and myself went to the box.

Q. Was that on the occasion when you and Mr. Turner saw Mr. Baumgardner at the police station?

A. Yes, sir.

Q. I think you testified that—was that on the—that was the meeting of November 6, 1952, when you and Mr. Turner saw the Baumgardners in Hawthorne, is that right? [152]

A. That is right.

Q. And that is the time that you asked for permission to examine their safe deposit box?

A. Yes.

Q. And they willingly gave it to you?

A. Yes.

Q. And that is the same occasion on which you testified that you told Mr. Baumgardner that it was no longer a routine investigation?

A. That is right.

Q. Now, at the conclusion of your investigation, Mr. Vitello, did you recommend criminal prosecution?

A. Yes, I did.

Q. And as a result of your recommendation, Mr. Baumgardner was indicted at the United States District Court for the Southern District of Cali-

(Testimony of Charles Vitello.)

fornia, being charged with filing false and fraudulent tax returns for the years 1947 to 1951, was he not?

A. Yes, sir.

A. Yes, sir.

Q. And about June or July of 1954, that case was brought to trial before a Jury, was it not?

A. Yes, sir.

Q. And you testified in that case, did you not?

A. Yes, sir.

Q. And the witnesses produced here yesterday—Mr. Adams [153] testified, did he not?

A. Yes, sir.

Q. And the Phyllis Miller that he referred to yesterday also testified, did she not?

A. Yes, sir.

Q. Have you seen any transcript of the testimony which you gave in the criminal trial?

A. I believe I read it in a cursory manner once.

Q. Did you do it recently in connection with your preparation to testify here?

A. No, I would not say that. I don't recall whether I did it in June or more recently. I cannot specifically say.

Q. Do you recall that you were asked this question:

“Q. Would you please relate to us the substance of the conversations in that August 11, 1952, conference?”

“A. I have some pencil notes that I made at the time. Occasionally I am going to have to refer to them. At that time I told Mr. Baumgardner that I had been assigned his income tax returns for in-

(Testimony of Charles Vitello.)

vestigation and I asked him for his books and records. He said he had none. He said he never kept any for himself. However, his wife had a [154] business called Milady's Style Shop and Irene Strewn kept the books and records for that enterprise. He said that his accountant was R. P. Ludolph who lived close by to the police station. He submitted—Mr. Baumgardner submitted figures to him each year for the preparation of his income tax return. I asked him if he had any record of his commission income. He said no, he had no record of his commission income.

“I asked him what was the source of it. He said they were private investigations.”

Do you remember that?           A. Yes.

Q. Now, you testified that on January 2, 1953, you talked to Mrs. Baumgardner and at that time you presented to her the financial statements that you had prepared, is that correct?           A. No, no.

Q. What is correct?

A. I returned to her at that time the 1951 copy that they permitted me to use. That was all I returned at that time.

Q. Well, was there any conversation with Mrs. Baumgardner at that time about any subject relating to this case? [155]           A. Yes, sir.

Q. What was that conversation?

A. I told her that I was anxious to get their signatures on the financial statements and Mrs. Baumgardner said that she hesitated to do so because many of the net worth—she never heard of it

(Testimony of Charles Vitello.)

before. It was the first time she had ever heard of them when we discussed them several months before. I told her that prior to the time that Mr. Bouchard had been engaged in the case, I felt free to talk to Mr. and Mrs. Baumgardner freely and that subsequently, I would have to get whatever information I had to get from the sources that were available to me.

Q. What else was said?

A. I asked Mrs. Baumgardner what she knew about Mr. Baumgardner's cash explanation and she said that she did not think her husband was telling the truth, because she never saw any large amounts of cash, certainly never as much as \$18,000.00, maybe \$1,000.00 but not such a large amount as \$18,000.00.

Q. So you were sure that Mrs. Baumgardner told you on that occasion that her husband must have been lying?

A. That is right.

Q. You are positive of this?

A. Positive.

Q. And that was after you had told both Mr. and Mrs. [156] Baumgardner in November that this was no longer a routine investigation, is that correct?

A. That is right.

Q. Now, what is that exhibit that you showed Mrs. Baumgardner?

A. The financial statement.

Q. What is that?

A. MM and NN.

Q. I show you Respondent's Exhibit MM and ask you if that is the schedule of assets and liabilities

(Testimony of Charles Vitello.)

which you showed Mrs. Baumgardner on this occasion?

A. I did not show her these schedules in January of 1953. The only time she saw the schedule was on November 6, 1952.

Q. She never saw this at this January meeting?

A. No, sir.

Q. Well, you said in this January meeting in 1953, she told you there were a lot of things on the schedule of assets and liabilities that she did not know anything about, is that what she said?

A. Yes.

Q. Did she disclaim any knowledge of a savings account in the Bank of America?

A. She did not specify any particular asset of liability. [157]

Q. So you did not go over these separately and she just said she never heard of these things, is that so?

A. No, she did not say that. She said some of these things she never heard about before.

Q. Did she specify what things?

A. No, she did not.

Q. Now, Mr. Vitello, you said something about asking the Baumgardners to sign a statutory waiver—who did you ask?

A. I know I asked Mr. Baumgardner and I am trying to recall at what conference that took place. I don't remember whether it was the November conference or the February conference. It must have been the November conference. If it was the

(Testimony of Charles Vitello.)

November conference then Mrs. Baumgardner was there also.

Mr. Sullivan: Could the witness refer to his notes to clear up his mind on that question?

Mr. Bouchard: No, no, this is cross-examination.

Q. (By Mr. Bouchard): What kind of a waiver were you asking them to sign?

A. A civil tax waiver.

Q. A waiver of what?

A. To extend the statute limitation, the civil statute limitations.

Q. Had you, at that time, completed your report? [158] A. No.

Q. What date did you complete your report?

A. Some time in April, 1953, to my recollection.

Q. I think you testified that they said to you that I was their attorney and I did not approve of their signing that, is that correct?

A. That is right.

Q. Now, you had prepared a net worth statement or a statement of assets and liabilities at that time which you had shown the Baumgardners and asked them to sign?

A. That is right, November 6, 1952.

Q. And they asked you to let them have it so that they could show it to their attorney, did they not? A. That is right.

Q. And you refused to do that, didn't you?

A. Yes, sir.

Q. Now, it is the practice of a special agent, is it not, to keep very confidential the facts they may

(Testimony of Charles Vitello.)

discover in the course of an investigation, isn't that true?

A. Sometimes. Some facts but some they do not. Actually it is as to what they decide is important and what isn't.

Q. What was that answer?

A. It is according to what facts they want to disclose to the taxpayer. [159]

Q. They tell the taxpayer what they want to tell him and that is it, is it?

A. Well, you could put it that way.

Q. Wouldn't that be the truth if you put it that way, Mr. Vitello?

A. In this particular case I had discussed every particular item with the taxpayer.

Q. Then why did you not want to let them have the copy of the financial statement, so that they could show it to me?

A. Because I wanted to be present when we discussed it with you.

Q. Why?

A. And I wanted them to be present, too.

Q. Why?

A. So that I could have a piece of evidence if it later became necessary to use it.

Q. At that stage of the proceeding, did you think you needed evidence?

A. I am always in need of evidence.

Mr. Bouchard: I do not agree.

Q. (By Mr. Bouchard): Now, you say that this is the first time in your experience as a special



(Testimony of Charles Vitello.)

agent that you have had an attorney who refused to let his clients sign a waiver of the statute? [160]

A. The civil statute, yes, sir.

Q. Don't you know, Mr. Vitello, that the only way that an attorney for the taxpayer can get any information about what the special agent is doing is by requiring him to get his notice of deficiency out within the statutory period? That is the first opportunity he has to know anything about the adjustments that have to be made.

A. Well, we told the taxpayers——

Q. Answer my question.

A. I suppose attorneys do that, I don't know.

Q. At least you found out one that doesn't, by your testimony.

Now, did you say that Mr. Baumgardner in one of your interviews when you discussed with him the Beacon Cafe, had given you some leads as to where you might go and look to determine the ownership of the Beacon Cafe?

A. Leads—no, I don't think he gave me any lead. He said that he did not own the Beacon Cafe. He did not suggest where I might go and verify about Mr. Bruno.

Q. At the time you talked to Mr. Baumgardner about the Beacon Cafe did you see the various escrows that have now been offered in evidence here?

A. I believe I had.

Q. Now, in one of these interviews, Mr. Baumgardner told you, did he not, that he had made

(Testimony of Charles Vitello.)

quite a lot of money [161] in buying and selling of Hawthorne municipal bonds?

A. The way he put it to me at the time was it was the explanation of the commission income on his 1947, 1948 and 1949 returns.

Q. You mean he told you that part of his commission income listed in 1947, 1948 and 1942 was the result of some profits made in dealing in Hawthorne municipal bonds?

A. And the sale of lots because of tax deficiency.

Q. Did you make any investigation to determine whether in the years 1947, 1948 and 1942 there was any dealing in municipal bonds?

A. I searched the Hawthorne records from 1935 through 1951, both records for the sale and purchase of lots and I could not find the taxpayers' names or their childrens' names listed.

Q. And having examined those records and not having been able to find Mr. Baumgardner's name either as a buyer or seller of those bonds, you concluded that he wasn't telling you the truth about the matter, did you?

A. Well, I don't know what I concluded. I just did not find any record of it and I did not give him any credit for it.

Q. Well, if you believed he made this money, you would have given him credit for it?

A. Yes.

Q. So because you did not give him credit for it, you [162] did not believe he was telling the truth?

A. I did not give him credit for it, no, sir.

(Testimony of Charles Vitello.)

Q. So you thought he wasn't telling the truth?

A. I did not give him credit for it.

Mr. Sullivan: I object to this question, your Honor.

The Witness: Well, I don't know.

Mr. Bouchard: All right, all right.

Q. (By Mr. Bouchard): I have now given you back the documents that you gave me, Mr. Vitello.

A. Yes, sir.

Mr. Bouchard: That is all, your Honor.

Mr. Sullivan: Just one more question then.

### Redirect Examination

By Mr. Sullivan:

Q. Mr. Vitello, you testified on cross-examination that you checked the bond records of the City of Hawthorne for the years 1935 through 1951, inclusive; is that correct for the starting year?

A. I checked the records for the City of Hawthorne from 1925 to 1951, that is, the disbursal records.

Q. I am talking about the bond records.

A. That would be the same.

Q. Then you testified on cross-examination from 1935 to [163] 1951, would that be incorrect?

A. That is right.

Q. 1925 would be correct?                      A. Yes.

Mr. Sullivan: That is all.

Mr. Bouchard: That is all?

Mr. Sullivan: Yes.

Mr. Bouchard: Now, Mr. Sullivan tells me that

that concludes the Respondent's case, is that right?

Mr. Sullivan: Yes, the Respondent rests.

Mr. Bouchard: I have Mrs. Baumgardner who is quite anxious to get away. I wonder if you would give me five or ten minutes with her? It will not take very long with her at all and I am sure ten minutes would be sufficient.

The Court: All right, let me know when you are ready.

Mr. Bouchard: All right.

(Recess taken.)

The Clerk: The Court is in session.

Mr. Bouchard: Mrs. Baumgardner. [164]

Whereupon,

#### PEARL E. BAUMGARDNER

was called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Pearl E. Baumgardner.

#### Direct Examination

By Mr. Bouchard:

Q. Mrs. Baumgardner, you are one of the taxpayers in this proceeding? A. Yes; I am.

Q. Are you acquainted with Mr. Vitello?

A. Yes, sir.

Q. Did you hear his testimony this morning?

A. Part of it.

Q. Did you hear his testimony to the effect that at a meeting that he had with you in January of

(Testimony of Pearl E. Baumgardner.)

1953, you stated to him that you thought Mr. Baumgardner was lying about some matters?

A. I heard him say that, yes.

Q. Is that true?

A. It is certainly false.

Q. Did you hear his testimony to the effect that at the same time or if not at that time, on some other occasion, [165] that you told him Mr. Baumgardner was quite a gambler?

A. That is false, too.

Q. Did you hear his testimony?

A. No, I did not hear that testimony this morning.

Q. Well, Mr. Vitello did testify that you had stated to him that Mr. Baumgardner was quite a gambler—did you ever tell him that?

A. I did not.

Q. Did you hear Mr. Vitello's testimony in its entirety during the course of the criminal trial?

A. Yes, sir.

Q. Did you ever hear Mr. Vitello testify to any of these things before?

A. Not prior to this morning, he did not, no.

Q. When were you married, Mrs. Baumgardner?

A. 1926.

Q. Do you have a family?

A. Yes, sir.

Q. How many children?

A. I have two, a boy 23 and a girl 18.

Q. Are they living in Hawthorne?

A. Yes.

(Testimony of Pearl E. Baumgardner.)

Q. Have you lived there all your life in Hawthorne, Mrs. Baumgardner?

A. Since 1919. [166]

Q. Did you go to school in Hawthorne?

A. In Inglewood.

Q. You have lived in Hawthorne continuously?

A. Yes.

Q. You heard Mr. Vitello's testimony that he went to your home and asked you for all of the records that you had pertaining to this tax matter?

A. Yes.

Q. Did you give him all the records you had?

A. I told him to take what he wanted, that he could have any of it. I did not have anything to hide.

Q. Did he take any of these records?

A. He took everything he wanted. He took them all into the living room, the majority of them.

Q. Now, in the early years after your marriage, Mr. Baumgardner worked in the fire department, did he not?      A. Yes.

Q. He would not have gotten a great salary?

A. About \$150.00 a month.

Q. Do you know whether or not Mr. Baumgardner had any money at the time when you and he were married?

A. I don't know how much but I know he had some.

Q. How did you know he had some?

A. Well, I wasn't depending on his salary.

Q. You were provided money by him from

(Testimony of Pearl E. Baumgardner.)

sources other [167] than his income, that is, in excess of the amount he was earning?      A. Yes.

Q. There has been some testimony that—strike that out.

Mr. Vitello testified to an occasion when he met you at some church in Hawthorne, do you recall that, Mrs. Baumgardner?      A. Yes, I do.

Q. What was the occasion for that meeting?

A. Well, I really don't know what the specific occasion was. He came to the church twice while I was there.

Q. What church was it?

A. The Baptist.

Q. Were you a member of that church?

A. Yes.

Q. Is Mr. Baumgardner a member of that church?      A. Yes.

Q. Was he active in church affairs?

A. Yes, at that time. He was president of the Mens' Brotherhood of the church.

Q. Did you, at either of the meetings in the church with Mr. Vitello, give him any books or records or documents pertaining to this matter?

A. Not at the church. I did not have occasion to have [168] the books over there.

Q. Do you know whether or not in any period in the thirties or the forties, if Mr. Baumgardner kept any amounts of money at home?

A. Yes.

Q. Do you know how much he kept there?

A. No.

(Testimony of Pearl E. Baumgardner.)

Q. Do you know whether it was much or little?

A. Well, I think sometimes he had quite a little bit.

Q. Do you know where he kept it?

A. Well, yes.

Q. Well, where?

A. Well, behind pictures and under the rug.

Q. Now, do you remember any occasion of any substantial amount of money being taken from under this rug?

A. Well, one occasion was when some friends of ours, whom we ran around and went to school with, she was expecting her baby and I believe it happened on a Sunday and Johnny came to our house on the Sunday morning and asked Jack if he could loan him any money for the hospital and he would give it back to him as soon as he could get to the bank, and I believe at that time, that Jack took it out from under the rug because it has always been a joke with these people and ourselves that, "If you want any money you can always get it under the rug in Jack's house." [169]

Mr. Sullivan: Can this be ascertained as to the time?

Mr. Bouchard: You can cross-examine on it.

Mr. Sullivan: Well, this is after the years in question and not relevant.

Mr. Bouchard: Well, that is all the examination. This is the end of it. That is all.



(Testimony of Pearl E. Baumgardner.)

Cross-Examination

By Mr. Bouchard:

Q. Mrs. Baumgardner, can you set about the time?      A. This was when——

Q. That is the time when you saw your husband take the money out from under the rug?

A. It was in 1932.

Q. 1932?      A. Yes.

Q. You have no idea, you say, how much money there was, Mrs. Baumgardner?

A. I have no idea at all.

Q. Where were you living in 1932?

A. On East Delaware where we were living at that time. Now, I think it is about 138th or 139th Street. I don't know which one of the streets it was because the streets were changed but it was on Delaware at the time.

Q. How long did you live there? [170]

A. Oh, I think about two years.

Q. Do you know what happened to the money when you moved?

A. I assume we took it with us.

Q. You don't know?      A. No.

Q. You did not take it?

A. I certainly did not.

Q. At that time did you clean your own house, Mrs. Baumgardner?      A. Yes.

Q. Did you clean under the rugs?

A. Yes; certainly.

(Testimony of Pearl E. Baumgardner.)

Q. Did you have occasion to see the money there, Mrs. Baumgardner? A. Yes.

Q. And did you count it? A. No, sir.

Q. What did you do when you cleaned your rugs? A. I cleaned under the rug.

Q. What did you do with the money?

A. I did not even touch it. I never have and I think anyone who knows me would tell you that I have never been the nosey type.

Q. Did you not have a vacuum sweeper? [171]

A. To be honest with you, at that time we did not have a vacuum sweeper.

Q. How old are your children?

A. My son will be twenty-three in May and my daughter is eighteen.

Q. They were born in the early thirties?

A. My son was born in 1933.

Q. Did you have this money around the house in 1938 or 1939?

A. I couldn't say, I presume so.

Q. You could not say? A. No; I could not.

Q. And your children were young children running around the house in say, 1938 and 1939?

A. Most young children run around the house.

Q. Weren't you worried about the money then?

A. No; because I don't know in 1938 or 1939 whether it was there or not. I said 1932.

Q. What years did you know it was there?

A. 1932.

Q. Before that? A. No.

Q. After that?

(Testimony of Pearl E. Baumgardner.)

A. After we moved I don't know.

Q. All you know is that in 1932 there was some money [172] there?      A. Yes.

Q. Under the rug?

A. That is right, also in tobacco cans.

Mr. Sullivan: That is all.

Mr. Bouchard: That is all.

Mr. Sullivan: Can we——

Mr. Bouchard: I suppose we can take our noon recess now, your Honor? I think that we can finish this afternoon.

The Court: All right, then, we will recess until 2:00 o'clock.

(Witness excused.)

The Clerk: 2:00 o'clock.

(Whereupon, at 12:20 p.m., a recess was taken until 2:00 p.m. of the same day.) [173]

Afternoon Recess, 2:00 P.M.

The Clerk: The Court is in session.

Mr. Bouchard: I would like permission, your Honor, to recall Mr. Vitello for about one or two questions.

The Court: Right.

Whereupon,

CHARLES VITELLO

called as a witness for and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Recross-Examination

(Continued)

By Mr. Bouchard:

Q. Mr. Vitello, I show you Respondent's Exhibit 1-A which is a schedule of assets and liabilities as prepared by the Respondent and which has been admitted by stipulation with certain exhibits by the Respondent.

I think you testified this morning that you completed your report on this case in about April of 1953, Mr. Vitello? A. That is right.

Q. And that, at the time you completed your report, had you made an investigation of the facts with respect to the ownership of the Beacon Cafe?

A. Yes, sir.

Q. And at the time you completed your reports, you [174] knew all of the facts with respect to the ownership of the Beacon Cafe which you know now; is that correct? A. No, sir.

Q. You have since discovered some other things?

A. Yes, sir.

Q. For example?

A. Mr. Staten originally testified to us that he was the real owner of the Beacon Cafe and subsequently he came in and he changed his explanation

(Testimony of Charles Vitello.)

and said that he was the nominee for Mr. Baumgardner, that Mr. Baumgardner gave him the money to put into the Beacon Cafe.

Q. Well, then, you have learned that story how recently?

A. I think it was about three months after I submitted my report.

Q. That you learned that? A. That is right.

Q. Well, now in the criminal trial which has been referred to, the United States versus Baumgardner, you prepared a schedule of assets and liabilities based on the net worth theory, did you not?

A. Yes, sir.

Q. And in the statement of assets and liabilities that was included by you on that occasion, you did not include as an asset any investment in the Beacon Cafe, did you? [175] A. That is right.

Mr. Bouchard: That is all.

Mr. Sullivan: I was going to call Mr. Vitello on rebuttal for one question, and I could ask him that question now.

### Redirect Examination

By Mr. Sullivan:

Q. Mr. Vitello, you heard Mrs. Baumgardner testify here? A. Yes, sir.

Q. Did you hear her state that you had not rendered certain statements that you testified to here in the criminal trial? A. Yes.

(Testimony of Charles Vitello.)

Q. That is in certain conversations with you that you testified to?

A. I testified to those conversations with Mrs. Baumgardner here but not in the criminal trial statements.

Q. Is that true?           A. Yes.

Q. Why did you——

Mr. Bouchard: Objected to as immaterial.

Mr. Sullivan: Your Honor, there was an inference left at the time of the examination of Mrs. Baumgardner that Agent Vitello was hiding this and he was just coming up with this [176] at this time and this question in the record is explaining why he did not testify to these matters at the criminal trial.

Mr. Bouchard: That isn't the proper redirect examination.

The Court: Overruled.

The Witness: Mrs. Baumgardner was not a defendant in the criminal trial and I could only talk about conversations that were held with Mr. Baumgardner or in his presence.

Mr. Sullivan: Thank you. Mr. Bouchard?

Mr. Bouchard: All right, that is all.

The Court: You are excused.

(Witness excused.)

Mr. Bouchard: Now, your Honor, we had some testimony yesterday from Mr. Adams and I asked him some questions as the basis for impeachment

and rather than be required to call the court reporter who took his testimony in the prior proceeding, Mr. Sullivan has agreed with me that he would stipulate that the questions that I asked and the answers made, as read by me to him, were given in that trial but Mr. Sullivan, it seems to me that he would like to have the entire testimony given by Mr. Adams, both direct and cross, in the criminal trial, offered in evidence in this case, and if he wants it, I have no objection to it.

So I may say that when we prepared the stipulation which [177] is now on file, one of the things that I was asked to stipulate to was that if Mr. Adams were produced, he would testify to the same things and the same went to Miss Miller. I refused to do that because they were the type of witnesses I wanted to take the stand.

It is in the record in this case that Miss Miller was under subpoena by the Government and arrived yesterday and had to be sent home for reasons which have been brought out and we have agreed that the testimony which Miss Miller gave in the criminal trial be offered in evidence here and I think that we have the testimony of both Mr. Adams and Miss Miller in one folder, is that right?

Mr. Sullivan: That is right.

Mr. Bouchard: And Mr. Sullivan has volunteered to use his copy of those depositions and I shall let him have access to mine whenever he wants them.

The Court: It will be admitted.

The Clerk: Respondent's Exhibit OO.

(The document above referred to was marked Respondent's Exhibit OO for identification, and received in evidence.)

The Court: I hope those letters which are used to identify the exhibit are not descriptive of the testimony.

Mr. Bouchard: I beg your pardon.

The Court: I said, I hope those letters which are [178] used to identify the exhibit are not descriptive of the testimony.

Mr. Bouchard: Your Honor had the benefit of hearing Mr. Adams, who I had intended to read into the record, the verbatim testimony of Miss Miller. I will not take up the time of the Court to do it now, because the Court will have it before it when it considers the case.

May it please the Court, there is one thing that I want to apprise the Court of. Last night, after I returned to the office, I found a note from Miss Irene Strewn who was a witness called by the Government yesterday morning.

I said I could not talk to her this morning but she persisted and I talked to her and she was quite disturbed about the fact that she discovered she had made an error in her testimony and she wanted to know what to do about it. And I said, "Well, if you come up to the Court today, I will apprise the Court of the fact that you would like to change your testimony and the Court can receive your correction on its own motion."

I advised Miss Strewn by telephone at 9:00 this



morning of that conversation; when I got here this morning, Miss Strewn was with Mr. Vitello and Mr. Sullivan and she was in quite an emotional state. I am not an accountant. She tried to explain to me what she wanted to correct.

Mr. Sullivan and Mr. Vitello apparently did [179] not want to recall her to the stand. Mr. Vitello and I went over what she was trying to do and Mr. Vitello was as sure as me that the correction in her testimony, if made, will have no effect upon any issue that is involved in these proceedings. That it would relate to a possible tax liability of somebody that we are not concerned with and he felt that the change would not affect any issue in this case, so with that information from him, I simply said to Mr. Sullivan that I did not see any reason for her to take the stand, unless she insisted on it and so she has gone home.

That is a correct statement, isn't it?

Mr. Sullivan: Yes.

The Court: Thank you.

Mr. Bouchard: I will now call Mr. Lococo.

The Clerk: Tell us your name, please, Mr. Witness?

Mr. Lococo: Andrew Lococo.

Whereupon,

ANDREW LOCOCO

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bouchard:

Q. Where do you live, Mr. Lococo?

A. At 231 Manor Drive, Hawthorne. [180]

Q. What is your business or occupation?

A. Restaurant and cocktail bar.

Q. What is the name of your bar?

A. The Cockatoo.

Q. The Cockatoo? A. Yes.

Q. Are you acquainted with Mr. Baumgardner?

A. Yes; I am.

Q. And Mrs. Baumgardner? A. Yes; I am.

Q. How long have you lived and operated your business in Hawthorne? A. Ten years.

Q. Were you acquainted with a person by the name of James or Jimmy Bruno?

A. Yes, sir.

Q. Are you familiar with the Beacon Cafe in Hawthorne, Mr. Lococo? A. Yes; I am.

Q. Are you acquainted with Clyde Walker, the former owner of that cafe? A. Yes; I am.

Q. Did you ever have a talk with Mr. Baumgardner with respect to him representing any person wishing to buy an interest in the Beacon [181] Cafe? A. Did you say Mr.—

Q. Mr. Baumgardner.

(Testimony of Andrew Lococo.)

A. Well, ask me that question again, please?

Mr. Bouchard: Will you please read it, Miss Reporter?

The Reporter: Yes, sir.

(Question read.)

The Witness: Yes.

Q. (By Mr. Bouchard): When was it, as near as you can remember?

A. I don't remember exactly, 1947 or 1946, about in there.

Q. And where did the conversation take place?

A. At the Cockatoo.

Q. What was said by you and what was said by Mr. Baumgardner in respect to it?

A. I knew that Jimmy was interested in the Beacon Cafe in Hawthorne——

Q. By "Jimmy" you mean——

The Court: By "Jimmy" do you mean Mr. Baumgardner, Mr. Lococo?

The Witness: No; Jimmy Bruno.

The Court: All right.

The Witness: And he asked me if I would intercede for him about the Beacon Cafe and I talked to Jack about it. [182]

Q. Did you tell Mr. Baumgardner that Jimmy Bruno was interested in acquiring an interest in the Beacon Cafe, Mr. Lococo?      A. Yes.

Q. And did you ask Mr. Baumgardner whether he would front for him and try to buy the interest for him?      A. Yes.

(Testimony of Andrew Lococo.)

Q. And what did Mr. Baumgardner say?

A. At the time I talked to him he said he would look into it and try and get together with Jimmy and see what he could do for him.

Q. Now, are you acquainted with Mr. Staten?

A. Yes.

Q. And do you remember when he was operating the Beacon Cafe?

A. 1948 or 1949, one of the two years.

Q. Mr. Staten appeared here as a witness yesterday, Mr. Lococo, and testified that he operated the Beacon Cafe for a period of about one year to date, I think he said, and that you came to him and told him that you were going to take over the running of it; is that correct?

A. In a respect, yes; it is correct. The answer is correct.

Q. Who requested you to take over the operation of it? [183]

A. Jimmy Bruno.

Q. And did you take over the operation?

A. Yes.

Q. And I think the record in this case shows that it was in the early part of 1949, January, 1949. Did you pay Mr. Staten anything for any interest he may have had?

A. I did not transact one cent with Mr. Staten.

Q. You did not pay him money or anybody?

A. No.

Q. When you operated that cafe, were you operating it for someone other than yourself?

(Testimony of Andrew Lococo.)

A. I was operating it for Jimmy Bruno.

Q. And during the time at least that you operated it, did Mr. Baumgardner have any interest in it?

A. No.

Q. Did the cafe have a liquor license?

A. Yes.

Q. And when you took it over in January of 1949, whose name was the liquor license in?

A. The liquor license went under my name.

Q. How long did you continue to operate the cafe, Mr. Lococo?

A. About one year and one month. I would say approximately one year.

Q. And what did you do with it? [184]

A. It was just losing money so I told Jimmy that unless he wanted to put money into it to keep it going, there was no money to be made in it and it was taking my time because the deal I had with him was that I would get a percentage and I wanted to get out of it.

Q. And did you get out of it? A. Yes.

Q. At the time you got out of it, what did you do with the liquor license?

A. A broker handled it.

Q. You sold it? A. Yes.

Q. Through a broker? A. Yes.

Q. And from the time that you got out and sold the liquor license of the cafe, you have never had anything to do with it since?

A. No.

Mr. Bouchard: That is all.

(Testimony of Andrew Lococo.)

### Cross-Examination

By Mr. Sullivan:

Q. Mr. Lococo, did you report the Beacon Cafe on your tax return as a profit or a loss?

A. As a profit and loss I believe my income tax shows that I did take a loss on the Beacon [185] Cafe.

Q. You took a loss deduction did you?

A. Yes.

Q. For somebody else's money on your income tax return? A. Yes.

Q. Did you know that you were doing wrong there, Mr. Lococo? A. Not particularly, no.

Q. When you sold the liquor license, what did you do with the money? A. Gave it to Jim.

Mr. Sullivan: Will you mark this document as Respondent's Exhibit next in order for identification?

The Clerk: PP.

(The document above referred to was marked Respondent's Exhibit PP for identification.)

Q. (By Mr. Sullivan): Do you wish to explain something, Mr. Lococo?

A. Yes. What money are you talking about? Let me get this clear.

Q. You said you sold the liquor license and the proceeds therefrom——

A. The proceeds therefrom was a lot of bills that

(Testimony of Andrew Lococo.)

were paid, bills that were due. That is where that money went to from the liquor license. [186]

The Court: Whose bills were they?

The Witness: The Beacon Cafe. Actually I was fronting for Jimmy Bruno. The bills were for the Beacon Cafe.

Q. (By Mr. Sullivan): Did Mr. Bruno tell you to use the money to pay the bills?

A. They had to be paid.

Q. Did he tell you?

A. I believe he was dead and they had to be paid.

Q. I show you Respondent's Exhibit PP marked for identification and ask you if you can identify that? A. Yes.

Q. What is it Mr. Lococo?

A. It is a check for \$4,980.00 made out to Andrew Lococo from Ralph Myer.

Q. And what does that represent?

A. It represents the money from the liquor license that was sold.

Mr. Sullivan: I offer Respondent's Exhibit PP for identification into evidence.

Mr. Bouchard: No objection.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit PP was received in [187] evidence.)

Q. (By Mr. Sullivan): When did Jimmy Bruno die, if you know?

A. Jimmy Bruno passed away, I believe, in Sep-

(Testimony of Andrew Lococo.)

tember of the same year that the Beacon was sold. The exact date I don't remember.

Q. It was before you received that check?

A. That is right, it was about one month or six weeks before I received that check.

Q. What was Mr. Bruno's business?

A. I don't know that he was in any other business outside of the Beacon Cafe. I knew him from my home town, Milwaukee.

Q. When did he come out to California, do you know, Mr. Lococo?

A. About the early part of 1946.

Q. And he died in 1950? A. Yes.

Q. At that time he wasn't in any business that you know of, except the Beacon Cafe?

A. The Beacon and he worked for me for a little while. For how much of the time I don't remember but he worked for me for a little while.

Mr. Sullivan: That is all.

### Recross-Examination

By Mr. Bouchard:

Q. Mr. Lococo, was it the money that you received from [188] this check, Respondent's Exhibit No. PP, that you used to pay the outstanding bills of the Beacon Cafe? A. Yes.

Mr. Bouchard: That is all.

The Court: That is all.

(Witness excused.)



Mr. Bouchard: Mr. Baumgardner.

The Clerk: Will you tell us your name, Mr. Witness, please?

Mr. Baumgardner: M. R. Baumgardner.

Whereupon,

M. R. BAUMGARDNER

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bouchard:

Q. Mr. Baumgardner, where do you live?

A. 1545 Jackson Avenue, Hawthorne, California.

Q. How long have you lived in California?

A. Since 1924.

Q. Where did you come from?

A. From Oklahoma.

Q. Prior to coming to California, were you employed in Oklahoma? [189]

A. Yes, sir.

Q. Doing what?

A. I was a motion picture operator.

Q. How much money did you earn in that job, Mr. Baumgardner?

A. \$45.00 per week.

Q. Were you married when you came to California?

A. No, sir.

Q. How long had you been earning this amount of \$45.00 per week in Oklahoma?

A. Three or four years I imagine.

Q. Did you have any money when you came to

(Testimony of M. R. Baumgardner.)

California, Mr. Baumgardner? A. Yes, sir.

Q. How much?

A. \$2,000.00 or \$3,000.00, maybe \$4,000.00. I don't know exactly.

Q. When you got here, did you find yourself a job, Mr. Baumgardner? A. Yes.

Q. Doing what?

A. I took a job as a dishwasher and then I started to work in the pool room and the hours were 8:00 in the morning until 8:00 in the evening and from 8:00 at night to midnight I worked in the pool room and from 8:00 in the morning to [190] the next night, I was in the fire department.

Q. Where did you sleep?

A. In the fire department.

Q. What compensation did you get from your job in the restaurant? A. \$25.00 a week and my food.

Q. When were you married?

A. August 20, 1926.

Q. Were you with the fire department at that time, Mr. Baumgardner? A. Yes.

Q. At the time you were married?

A. Yes, sir.

Q. Do you remember what salary you got from the fire department?

A. \$150.00 a month. And then I worked as an engineer.

Q. You later became connected with the Hawthorne police department? A. Yes.

Q. When? A. 1927.

(Testimony of M. R. Baumgardner.)

Q. How long were you employed with the Hawthorne police department?

A. From 1927 until June, 1933.

Q. You were chief of police for a period of time, were [191] you not?

A. Yes; from November 8, 1937, until my retirement.

Q. In June of 1953? A. Yes.

Q. Do you have a family? A. Yes.

Q. How many children?

A. One daughter and one son.

Q. At the time you worked in the police department of the City of Hawthorne, did you make any money outside of your salary from the city?

A. Yes, sir.

Q. Doing what?

A. Well, I worked as an extra for parts that you play. I do not mean I was a movie star, but I was in parts for Metro Goldwyn Studio—oh, it could have been for one or two years and on.

Q. And that is in connection with the making of pictures, is it? A. Yes, sir.

Q. What compensation did you receive for those services, Mr. Baumgardner? A. \$40.00 a day.

Q. Now, did you derive any portion of income from any other source? [192] A. Yes, sir.

Q. From what?

A. City of Hawthorne stocks or bonds.

Q. When did you start buying those bonds of the City of Hawthorne?

(Testimony of M. R. Baumgardner.)

A. In the early thirties, 1934 or 1935, something around in there.

Q. Over what period of time did you engage in that business?

A. Through 1938 and 1939. I cannot tell you the exact time.

Q. From whom did you buy these municipal bonds of the City of Hawthorne?

A. Tad Travers, and there were bonds exchanged back and forth between Government officials of the City of Hawthorne.

Q. Do I understand from your testimony that not only you but other officials and employees of the City of Hawthorne were buying and selling bonds of the City of Hawthorne?

A. Yes. They had meetings in which they stated that the bonds were available to any and all who wanted to buy them.

Q. Do you have any idea, Mr. Baumgardner, about how much money you made over that period of time in buying and selling these municipal bonds?

A. \$12,000.00, \$13,000.00, \$15,000.00 maybe \$16,000.00. [193]

Q. What did you do with the money?

A. I kept it at home.

Q. Why didn't you keep it in the bank?

A. Well, my experience as a controversial person in the City of Hawthorne is that you were always subject to a lawsuit because of false arrest or something you had done wrong, so I kept it at home.

(Testimony of M. R. Baumgardner.)

Q. Were you a controversial person in the City of Hawthorne?

A. For twenty-nine years; yes, sir.

Q. Isn't it a fact that during your experience as Commissioner of Police you lost your job and then sued to get it back and succeeded? A. Yes.

Q. And then you were demoted and finally re-instituted as chief of police? A. Yes.

Q. So that you have been in and out more than once, Mr. Baumgardner? A. Yes, sir.

Q. What did you ultimately do with these moneys that you had made from the sale of the bonds?

A. Well, actually, one day you would be rich and the next day you would be poor. You could have all your money in bonds and exchange it back and forth and one month you would be [194] well off and the next month you would be poor.

That went on for a period of time, in the early thirties and up to 1939.

Q. After you had acquired these monies, what did you do with the monies?

A. I invested in real estate, in buying Mortgage and Trust Deeds.

Q. There has been offered into evidence, Mr. Baumgardner—I don't know if you have seen it—since you have been in the courtroom, a schedule of properties owned by you in the various years. I think you have seen it and that we have agreed is a correct statement of properties that you owned at the time? A. Yes, sir.

(Testimony of M. R. Baumgardner.)

Q. And were those properties purchased out of these funds? A. Yes; they were.

Q. Mr. Baumgardner, we have stipulated in this case that if Archie Sneed were called to testify, he would testify as follows:

“Q. Do you know Mr. Baumgardner?

“A. Yes, sir.

“Q. How long have you known Mr. Baumgardner? A. Twenty-five years.”

And he would testify that during the year 1951, he [195] was a general partner in the Embassy Club and that that partnership consisted of himself as a general partner and five limited partners, and I think it was a poker club.

And that on January 1, 1951, he made a gift of five per cent interest in the Embassy Club to you and that you paid nothing for it and it was given to you by him voluntarily because of your friendship.

Will you explain the circumstances under which Mr. Sneed gave that five per cent interest to you?

A. There were three or four of us having lunch in a restaurant located in Van Ness and Florence Avenue, Los Angeles. Mr. Sneed came in and sat down at the booth with us and was telling us a story about giving—I have forgotten, fourteen or fifteen per cent of the business to some friend, who later died, and that it cost him \$15,000.00 to get it back.

I said then, “You are big hearted as long as I have known you, why don’t you be generous to me?” And he said, “Well, I shall as of now give you five per cent.”

(Testimony of M. R. Baumgardner.)

Q. In what? A. Of the Embassy Club.

Q. And there has been offered in evidence here, Mr. Baumgardner, as one of the exhibits, that partnership agreement 4-D—I will show you, Mr. Baumgardner, Exhibit, Respondent's Exhibit 4-D, which is a photostatic copy of that partnership agreement, and ask you if that signature "M. R. Baumgardner" is [196] your signature? A. It looks like it.

Q. Well, it looks like it to you and I stipulated that it was.

Now, Mr. Baumgardner, during the year 1951, did you receive any income from the Embassy Club?

A. No, sir.

Q. Mr. Pool has offered in evidence a letter which he says he sent to the partners of the Embassy Club some time in March of 1952, showing them what he claimed to be their distributive share of the income.

Did you report on your 1951 income tax return any income from the Embassy Club?

A. I do not believe I did because I did not receive any.

Q. That is the reason you did not report it?

A. Yes, sir.

Mr. Bouchard: Mr. Vitello, do you have a photostatic copy of Mr. Baumgardner's return for 1952?

Mr. Vitello: Yes.

Mr. Bouchard: Can I see it?

Mr. Sullivan: Here it is.

Q. (By Mr. Bouchard): Mr. Baumgardner, do you remember discussing with Mr. Vitello your interest in the Embassy Club? [197]

(Testimony of M. R. Baumgardner.)

A. Yes, sir.

Q. And did you have a conversation with him with respect to what you should do in filing your future returns with regard to the Embassy Club?

A. Yes, sir.

Q. What was it?

A. On the first interview, I believe with Mr. Vitello, he came out with a statement, I believe, that was prepared by Mr. Pool, which I had never seen before and I had no knowledge of it.

It stated that there had been a gain or so much money earned by the partnership and showed a check with my signature on there or alleged to be my signature and I said, "Well, if that is the case, I am more or less in a jam."

Q. What was the amount of the check?

A. \$250.00 I believe it was.

Q. \$250.00? A. I believe it was.

Q. And that check was shown to you?

A. Yes; it was.

Q. And the endorsement M. R. Baumgardner was on the back of it?

A. Yes; but it wasn't my signature.

Q. Did you advise Mr. Vitello that that wasn't your signature? [198]

A. I did and as I stated there was a "t" instead of a "d."

Q. Was the name "Baumgardner" spelled correctly?

A. I pointed out it was a "t" instead of a "d."

Q. I show you the photostatic copy of your 1952



(Testimony of M. R. Baumgardner.)

income tax return which Government counsel has handed me——

Mr. Sullivan: First, may I have that marked for identification, please?

Mr. Bouchard: Just a minute, if you please.

Q. (By Mr. Bouchard): This shows \$3,238.57 which apparently you listed as income in 1952.

A. Yes, sir.

Q. Did you ever receive that money?

A. No, sir.

Mr. Bouchard: I will offer this as our exhibit—I realize I took it from your file but I assume you have got another one.

Mr. Sullivan: I was going to put it in as my exhibit if you were not going to do so.

The Court: Well, we will have to wait for the Clerk, unless you can find the “admitted” stamp there.

Mr. Bouchard: We will just leave that for him to do. [199]

Q. (By Mr. Bouchard): You did, however, receive some money during 1952 from the Embassy Club, did you not?

A. After I made a little investigation myself, I received some \$750.00, I believe it was.

Q. That was a poker club out in Gardena?

A. Yes, sir.

Q. And those clubs are licensed and legal in that area?

A. Yes; in the state of California.

(Testimony of M. R. Baumgardner.)

Q. Were you ever in the club ?

A. Since the very opening, I don't think I have been in there more than three times. I have been in there twice prior to this investigation.

Q. Did you hear Mr. Vitello's testimony this morning, Mr. Baumgardner?      A. Yes, sir.

Q. Did you hear his testimony to the effect that in one of his interviews with you he inquired about commissions that you had reported on your tax returns for the years 1947, 1948 and 1949, in the amounts of \$2,000.00, \$3,000.00 and \$6,000.00 ?

Did you hear his testimony to the effect that when he asked you what it was that you told him it was from sources which if you disclosed them to him you might lose your [200] job; did you hear that testimony?      A. Yes.

Q. Did you make such a statement to him in any of your interviews with him?

A. It wasn't that exact statement. I said, "It might cause me trouble."

Q. Could it or did it cause you trouble?

A. The City of Hawthorne states that no employee shall receive wages or moneys other than their wages unless you have permission of the Civil Service Commission and the Council of the City of Hawthorne—242.

Q. Mr. Baumgardner, you maintained a savings account at various times in the Bank of America, did you not?      A. Yes, sir.

Q. First, let me ask you, did you keep any books or records of your various real estate transactions?

(Testimony of M. R. Baumgardner.)

A. No, sir; I am sorry I did not.

Q. Why didn't you do it?

A. I wasn't in any kind of a business—I did not have any kind of education to keep them, if I had wanted to.

Q. Respondent's Exhibit No. 3-C is a schedule of interest income received, not received by you but rather earned by you during the years 1944, 1945, 1946, 1947, 1948, 1949, 1950 and 1951, in various amounts. In 1944 it is \$115.03. You can see those totals. Were these amounts of interest [201] paid to you during those years or were they credited to accounts in the bank?

A. All deposited in my name with the Bank of America.

Q. Were there any of them that were paid to you by check that you are able to recall? Looking over them, for example, this one——

A. Yes; he paid his by check.

Q. Who?           A. Mr. Mann.

Q. And were the others——

A. They were all deposited in the Bank of America, Hawthorne Branch.

Q. And were the moneys that were deposited there to your account—did they include principal and interest or were they just interest?

A. Principal and interest.

Q. On Trust Deeds owned by you?

A. Yes, sir.

Q. We have stipulated, Mr. Baumgardner, that in 1935 you acquired a piece of property at 162

(Testimony of M. R. Baumgardner.)

Ramona Avenue at a price of \$2,500.00 and that you sold that property in 1944 for \$7,353.17; what kind of a property was that?      A. Dwelling.

Q. Did you live in the dwelling?

A. Yes; we did. [202]

Q. For how long a time?

A. Oh, I would think somewhere—either—somewhere around 1938 or 1939.

Q. And then what did you do with it?

A. Well, we rented it for a while.

Q. Until you sold it?      A. Yes.

Q. In 1944?      A. Yes.

Q. During the course of time that you had that property, did you have to make any improvements on it?      A. Yes, sir.

Q. What were the nature of the improvements and what is your best estimate of the amount of those improvements, Mr. Baumgardner?

A. For the entire time I held it?

Q. Yes.

A. Well, there was dry rot and those bugs that eat up furniture, termites.

Q. Termites?

A. Yes; and after a period of years we got the termites out of it and then we put in a retaining wall in it, that cost around \$2,500.00, I think.

Q. We have stipulated that you acquired property at 158 Ramona Avenue in 1941 at a cost of \$2,064.00 and that you [203] sold it in 1944 for \$5,816.00; what kind of a property was that?

A. It is next to the one you mentioned first, and

(Testimony of M. R. Baumgardner.)

it was in a worse condition than 162. I had to tear the thing down and almost rebuild it.

Q. Do you have any idea what the cost of those improvements would be?

A. It was more than 162. It would have cost about \$3,000.00 I would say.

Q. Now, we have agreed to stipulate that you purchased property at 611, 617 Truro Avenue, Hawthorne, in 1940 and paid \$5,236.00 and you sold it in 1945 for \$11,000.00; what kind of property was that?

A. That piece of property was purchased by my father. He wasn't able to carry it on so I took it over for him. I did sell it later on for \$11,000.00.

Q. And you made, during the time that that property was held by your father or yourself, what improvements if any?

A. The entire City of Hawthorne in those years was sunken. Every place in town had to be rebuilt and the concrete foundation had to be built higher. That was even worse than the two others because of the place it was located in and I spent a pretty good lump on it.

Q. What would be your best estimate of [204] that?

A. Well, say \$2,500.00, something like that.

Q. Mr. Baumgardner, we stipulated in the record—it isn't pursuant to a written stipulation—that in 1945 you loaned \$6,500.00 to a man by the name of Gibson—do you recall that?

A. Yes, sir.

Q. And that in 1946 he repaid you the sum of

(Testimony of M. R. Baumgardner.)

\$6,900.00, is that right?      A. Yes, sir.

Q. Which looks as though you made \$400.00 on that transaction. That doesn't appear to have been returned as income by you in your return for 1946. Why did you not report that?

A. At a very short date later, he came to me and borrowed \$500.00 to go to Kentucky to bury his brother who had been shot, so I did not get the \$400.00.

Q. Well, you made \$400.00 and you loaned him \$500.00 within a short period of that?      A. Yes.

Q. And did he ever pay back that money?

A. \$50.00 of it I got.

Q. Is that all you ever got?      A. That is all.

Q. What was the conversation you had with Mr. Vitello the first time that he met you in August of 1952 at the police [205] station in Hawthorne?

A. He came to the police department, introduced himself and showed me his credentials and I made the statement that I was used to working with Internal Revenue men and I invited him into my office.

The first question I believe he asked me was, "I understand you were a motion picture operator in Oklahoma in previous years at \$45.00 a week?"

I said, "Yes, sir," and then I said, "What are you doing? Are you investigating me?"

And he said it was nothing to get worried about, it was just a record check. Then he wanted to know if I was married and what were these commissions

(Testimony of M. R. Baumgardner.)

on my return, and I said, "Are you putting a number on my back instead of a name?" And he kept emphasizing the fact that it was just a routine check. He wanted to know who my accountant was and about the various properties and Trust Deeds. That is just about the conversation.

Q. At the time he exhibited his credentials to you, did you know the different functions of a special agent and a revenue agent? A. No, sir.

Q. Was it at the first visit that he asked to see the records you had? A. Yes. [206]

Q. And you directed him to go to Mrs. Baumgardner and get them? A. I did.

Q. At his request, did you also give him permission to open your safety deposit box?

A. I did.

Q. And inspect that? A. Yes.

Q. And did you tell Mr. Vitello that you had made quite a little money in the thirties in dealing in Hawthorne bonds? A. I did.

Q. And did you tell him that some of this money that you had made dealing in Hawthorne bonds had been used to improve some of these properties that we admit you owned?

A. I think I did but I am not sure.

Q. Did you, in your work in the police department, Mr. Baumgardner, earn commissions from any sources?

A. Well, I think the accountant put them down as commissions, but actually I received them as a gratuity. Numerous times I would have people come

(Testimony of M. R. Baumgardner.)

in and ask for private investigations and I would receive sometimes \$25.00, \$50.00 or \$100.00. It all depended on how much the case for the private investigation amounted to.

Q. Now, when you filed your income tax for the years [207] here involved or for any other year, for that matter, was it your opinion that you had included in your return all of the income that you had received during that year?

A. More than enough, yes, sir. I thought I was being very fair.

Q. Now, on your return of 1949, Mr. Baumgardner, this is Respondent's Exhibit No. 9-I, you report commission of \$6,000.00 in 1948; you reported miscellaneous commissions \$3,000.00 which is Government's Exhibit H and in 1947 commission, Exhibit 7-G, you reported—excuse me, give me a moment, your Honor—you reported commissions of \$2,000.00.

Now, were those commission amounts that you reported—what are they intended to cover?

A. Any moneys I might receive during the year for interest, for gratuities or anything that might come along, other than my salary.

Q. I notice that in the year 1949 you reported \$6,000.00 but in 1950, you did not report commissions—did you have income from outside sources in the year 1950, Mr. Baumgardner?

A. No, I wasn't working in the early—in the latter part of 1950.

Q. That was—strike that out, please. Was that



(Testimony of M. R. Baumgardner.)

one of those years when you were on the out as chief?

A. That is when I got fired again. [208]

Q. Then you were reinstated?

A. Yes, sir, in 1951.

Q. Now, I think you testified that all of the interest income that you received was shown on the Exhibit Respondent's 3-C, with the exception of the income from Mr. Mann which was credited to your account in the bank?

A. To the best of my knowledge, yes, sir.

Q. In the course of your taxable year or prior to the time you made out your return for that year, did you call up the bank and ask them how much money they had credited to your account?

A. No, sir.

Q. It never occurred to you to do it?

A. No, because I thought Mr. Ludolph knew it was about the same every year.

Q. They were on the same Trust Deeds?

A. Yes, sir.

Q. Now, you heard Mr. Adams' testimony, did you not, Mr. Baumgardner?

A. Yes, sir.

Q. You have also heard it before, haven't you?

A. Several times.

Q. Did you ever have any deals or understanding with Mr. Adams that for a consideration that you, as chief of police, would afford him police protection for operating a [209] house of prostitution in Hawthorne?

A. No, sir.

Q. Did you ever have any such understanding with Mr. Ganatta?

A. No, sir.

(Testimony of M. R. Baumgardner.)

Q. Did you know Mr. Ganatta very well?

A. Yes, very well.

Q. What did he do in Hawthorne?

A. He owned the City Cab.

Q. Did Mr. Ganatta ever pay you \$300.00 a week or any other sum for affording police protection to either Mr. Adams or Phyllis Miller, or both?

A. He or no one else ever paid me any protection, period.

Q. Did you hear Mr. Adams' testimony to the effect that he and Mr. Ganatta had a conversation with you in the alley adjoining the police station?

A. Yes, sir.

Q. Did you and Mr. Ganatta and Mr. Adams meet in the alley and have a conversation about anything?

A. Yes, sir.

Q. What was the conversation and how did it take place?

A. Prior to this meeting of Mr. Adams and Mr. Ganatta, I had issued orders to pick up the license of Raymond Adams [210] because he falsified his application. It states thereon:

"Have you ever been convicted of a felony?" And he put on it, "No."

And after going through the matter with the Federal Bureau of Investigation and the State Bureau of Investigation, the reports came back showing that he had been convicted so Captain Parker was instructed to pick up his cab license.

The reason for the conversation in the alley was Mr. Ganatta asking me to give him another chance.

(Testimony of M. R. Baumgardner.)

He was financially destitute and he had a wife and kids and that I would be doing him a favor, and after talking back and forth I agreed to let him have it, but that he would have to be responsible and if he ever saw anything wrong that he would turn the license in himself and he did a short time later.

Q. Mr. Ganatta did? A. Yes, he did.

Q. Did he discharge Mr. Adams?

A. Yes, he did.

Q. By the way, Mr. Baumgardner, have you ever been convicted of a criminal act, either a felony or a misdemeanor?

A. This is my first arrest.

Q. What do you mean?

A. The one that Mr. Ganatta was responsible for.

Q. Have you ever been convicted?

A. I have never been in jail. [211]

Q. I did not ask you that. You have never been convicted of a criminal act, either a felony or a misdemeanor, have you? A. No, sir.

Q. Did you hear Mr. Adams' testimony to the effect that in this conversation you—let me see your other hand—did you hear the testimony of Mr. Adams that he had this conversation with you that you showed him a diamond ring and that you said that some madam had given you that?

A. Yes, I did.

Q. Did you ever have such a conversation with him, Mr. Baumgardner? A. No.

(Testimony of M. R. Baumgardner.)

Q. How long have you worn that diamond ring, Mr. Baumgardner? A. Since 1946.

Q. Where did you get it?

A. I got it from the brothers of the lodge.

Q. What was the occasion for that?

A. I was made a 32nd degree mason.

Q. Did you ever get—strike that out, please. Did you ever meet Mr. Adams or Mr. Ganatta at the donkey baseball games? A. Never.

Q. Did you ever learn that a house of prostitution was [212] being operated in Hawthorne by Mr. Adams and Phyllis Miller, Mr. Baumgardner?

A. Yes, sir.

Q. How did you learn about it?

A. Officer McGowan and Officer Hill were the two officials that were working on the evening radio car. Officer Hill told me that there was more traffic than usual on 141st Street and I said, "What kind of traffic"?

And he said, "Taxicabs." When he was relieved at at 8:00 in the morning he reported that to me. The next evening I went in the radio car with he and Officer McGowan but there was no activity for some reason or other and it was shut off before we got there.

Q. How long did it actually operate?

A. Five or six days. When Phyllis Miller testified it was eight days, I will agree with her because it might have been eight days before we found it.

Q. Mr. Adams testified that he had this conversation with you and he said you said that you would

(Testimony of M. R. Baumgardner.)

think about it and would suggest a place for him to open up.

A. He would testify to anything because I took his license from him.

Q. Well, there is no truth in that statement, is there?      A. No. [213]

Q. How big a town is Hawthorne?

A. 28,000.

Q. Has there been much or little vice in Hawthorne, Mr. Baumgardner?

A. Very little vice.

Q. It has the reputation of being a clean little community?      A. Yes, that is true.

Q. Did you ever buy any property, Mr. Baumgardner, in the name of either your daughter or your son?

A. Yes, I bought automobiles but I cannot remember about any real property.

Q. You say you bought an automobile in either your son or daughter's name?      A. Yes.

Q. Why did you do that?

A. Well, we were always subject to false arrest. The more you have in somebody else's name, the less possibility there is that they can take it away from you.

The Court: We will have a short recess.

(Short recess taken.)

The Clerk: The Court is now in session.

Q. (By Mr. Bouchard): Mr. Baumgardner, the principal items that the Government claims which

(Testimony of M. R. Baumgardner.)

were left off of your tax returns were [214] interest and in one case, \$20.00 or \$25.00 worth of dividends that I will refer to in a minute.

Why did you not, on your tax returns, include specifically these items of income which I have stipulated to were earned by you in those years?

A. The biggest part of these—the interest, I was paying out more than I was getting in.

Q. Was the interest actually paid to you?

A. Actually I never received any of it. It was deposited in my account.

Q. But as well as having earned income, these amounts, were you also paying interest on obligations? A. Yes, sir.

Q. Now, you started building your home in 1948, did you not? A. I believe so.

Q. And did that require any cash?

A. Yes, sir.

Q. How much?

A. I borrowed \$7,500.00 from the Bank of America and I think I have \$6,500.00 today.

Q. And what did the house cost you?

A. It cost me \$14,500.00, all equipped and ready to move in.

Q. You mean furniture—— [215]

A. That was furniture and everything.

Q. Mr. Baumgardner, if there is any income or if it is established in this case that there is any income that you earned or which was earned by you in any of these years that wasn't reported on your return, regardless of what amount it was, was any

(Testimony of M. R. Baumgardner.)

of that income omitted by you the purpose of evading any tax?       A. No.

Q. Did you, during these years 1942 to say 1949, have any substantial amount of cash on hand?

A. Yes, at one time I probably had \$15,000.00, \$16,000.00 or \$18,000.00 probably.

Q. And was that money that was a result of your dealing in the bonds you have talked about?

A. Yes.

Q. And you did, did you not as police chief, make some money on private investigations?

A. Yes, sir.

Q. Now, what was your cash position say during the years 1950 and 1951?

A. Oh, I would be down a few thousand. I built four little homes and I was building my own home, so I was getting pretty low until I sued the Hawthorne Press and then I got liquid again.

The Court: You got liquid or licked? [216]

The Witness: Liquid.

Q. (By Mr. Bouchard): As a matter fact, you recovered rather a substantial amount from the Hawthorne Press in the libel action, did you not?

A. Yes, I did?

Q. A rather substantial amount?

A. Yes.

Q. What was the amount?

Mr. Sullivan: I object. This is not relevant because it isn't in the tax years.

Mr. Bouchard: Was the suit in 1951, 1952—

(Testimony of M. R. Baumgardner.)

The Court: Well, let him answer the question. What was the amount?

The Witness: The judgment was \$17,500 and there was a settlement of \$13,500.00.

The Court: Did you receive any of these amounts in the taxable years?

Mr. Bouchard: I believe not, your Honor.

The Witness: The income tax report will show it exactly.

Mr. Bouchard: No, your Honor.

May I approach the witness, your Honor?

The Court: You may. [217]

Q. (By Mr. Bouchard): Mr. Baumgardner, it is the contention of the Government in this case that you had some interest in the Beacon Cafe—you know where the Beacon Cafe is? A. Yes, sir.

Q. How long have you known that?

A. Ever since the beginning, I think, it was in 1933.

Q. Where is it located with reference to the police station?

A. It is across Hawthorne Boulevard and about one block north from the police department.

Q. You have heard some testimony in this case to the effect—and this testimony comes largely through exhibits in the form of escrows that you gave Mr. Walker or he understood you put up the money for a half interest in the Beacon Cafe—did you hear his testimony? A. Yes, sir.

Q. Did you put up some of your own money to purchase an investment in the Beacon Cafe?



(Testimony of M. R. Baumgardner.)

A. No, sir.

Q. Why did you say, "No, sir"—I call your attention to the fact that the escrows show that you put up certain money in escrow—explain this whole Beacon Cafe transaction to the Court.

A. All the officials of the City and County used to [218] meet for lunch and one day while I was in there, I was approached and asked to see what I could do for Jimmy Bruno, that he was interested in part or all of the Beacon Cafe. It was Andy Lococo who approached me, and I told him I would do what I could.

After that, Clyde told me that they were trying to get——

Q. That is Clyde Walker?

A. Yes, and one morning I was sitting talking in the Beacon Cafe and he said he could get it for me, so I think I gave him some cash and possibly a check. It was about the time that Lee Gibson was closing the escrow.

Q. And that is the \$6,900.00 check that we have stipulated to here?

A. Yes, that is right. I endorsed it over to him. Any way, after I gave him this money, he told me he would take it to escrow and that is how I got involved with Clyde Walker.

Q. Did Mr. Lococo make—did Mr. Lococo give you any reason why he wanted you to front for Jimmy Bruno?

A. He either stated it was because he was having domestic trouble or he had a record. I don't remem-

(Testimony of M. R. Baumgardner.)

ber now but I have heard many things since. I think it was because of his domestic trouble in Milwaukee.

Q. You say that this \$6,900.00 you got from Gibson you transferred into this escrow; did you ever receive that back [219] from Jimmy Bruno?

A. Oh, yes.

Q. And any moneys that you advanced in the various years you were reimbursed by Mr. Bruno, were you?           A. Always.

Q. Now, you remember when Mr. Staten became interested in the Beacon Cafe, do you?

A. Yes, sir.

Q. What were the circumstances under which he became interested?

A. Well, we were having a little party for Jim Staten's return from the armed forces and the proposition was to see if I could get Staten in there and he agreed to take it for one year. If he took it over at the end of the year he got half of it and if not, he was supposed to surrender it.

Q. Who was he going to surrender it to?

A. To Jimmy Bruno at the time.

Q. Is that the extent of your connection or interest in the Beacon Cafe?           A. That is it.

Q. Was the Beacon Cafe any sort of an investment that would have interested you personally?

A. Not at all.

Q. Why?

A. Because it is a dive at the back and had a third [220] rate restaurant at the front.

(Testimony of M. R. Baumgardner.)

Q. Now, you remember when Mr. Andrew Lococo took over and started to operate it, do you?

A. Yes, just about.

Q. You never had any interest in the Cafe during his operation?

A. I never had an interest in any cafe or bar, period.

Q. Any of the moneys that you may have put up out of your own funds, as for example, the \$6,900.00 you say you think you put up in escrow, you put that up on behalf of Jimmy Bruno and he repaid you?

A. Yes, sir.

Mr. Bouchard: I think that is all, your Honor.

### Cross-Examination

By Mr. Sullivan:

Q. Mr. Baumgardner, outside of bank and lending transactions, what is the largest amount of cash on hand that you had at any time?

A. \$16,000.00 to \$18,000.00.

Q. Do you know when that was?

A. Oh, I imagine 1947 or 1949 or 1946 possibly, somewhere in there.

Q. Where did you keep it?

A. At home, all over the joint.

Q. You never counted it? [221]

A. Why? I knew where it was. I felt that it was safe.

Q. Did you ever take vacations?

A. Yes, sir.

(Testimony of M. R. Baumgardner.)

Q. Did you leave the money just there around the house when you were on a vacation?

A. Yes, sir.

Q. What did you do when you moved from one house to another?      A. Took it with me.

Q. Did you count it at that time?

A. No, I did not. I carried it in my money belt.

Q. Did you take it out of the places all over the house and put it into a money belt?

A. No, that is when I moved.

Q. When you came from Oklahoma, you say you had \$2,000.00, \$3,000.00 or \$4,000.00?      A. Yes.

Q. You don't know whether it was \$2,000.00, \$3,000.00 or \$4,000.00?      A. No, I do not.

Q. Where did you live when you came out here to California?

A. I stayed in the fire department. That was just about 1927. [222]

Q. Did you live there?

A. Yes, when I was married I worked six days and six nights in the week.

Q. Did the fire department furnish you with a separate room?

A. No, it was just a fire department.

Q. You mean it was just a dormitory?

A. No, there was only two of us. It was only one great big room.

Q. Where did you have the money then?

A. In my belt.

Q. Did you count the money when you got married, Mr. Baumgardner?      A. No.

(Testimony of M. R. Baumgardner.)

Q. Where did you keep it after you were married and moved into a house or apartment?

A. Picture frames, put it behind pictures, tobacco cans, coffee cans, and all over the place.

Q. When did you live at 162 Ramona?

A. I believe that was 1935 or 1936, somewhere in there.

Q. 1935 or 1940?

A. No, it would not be 1940 because we were living on 611 Truto then.

Q. Where did you keep the money at 162 Ramona, Mr. Baumgardner? [223]

A. In my belt.

Q. And you moved to 611 Truro from 162 Ramona, did you?      A. Yes.

Mr. Bouchard: Your Honor, I makes this suggestion; I have one more witness that I think will be reasonably short and I hate to keep this man waiting. It is agreeable to Mr. Sullivan that we can put him on first, if it is agreeable with the Court.

The Court: It is agreeable to me. You are excused, Mr. Baumgardner, meantime.

(Witness temporarily excused.)

The Clerk: Will you tell us your name, please?

Mr. Travers: Tad Travers.

Whereupon,

TAD TRAVERS

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bouchard:

Q. What is your name, please?

A. Tad Travers.

Q. And your first name is Tad? [224]

A. Yes, sir.

Q. Mr. Travers, where do you live?

A. 518 Anhurst Drive, Berkeley.

Q. What is your business or occupation?

A. I am in the oil business.

Q. What company?

A. The Brookline Oil Company of California.

Q. Are you an officer of that company?

A. I am the president of the corporation.

Q. What was your business and occupation during the years 1932 to 1940?

A. I was in the investment security business with a firm called Crowell, Weedon & Company, Los Angeles.

Q. And is that one of the larger well-known investment houses in this city? A. Yes, it is.

Q. During the period that you were with them, did they do a substantial volume of business in securities? A. Yes, sir.

(Testimony of Tad Travers.)

Q. When did you start with them and when did you terminate your relationship with them?

A. 1932, at the inception of that business, that is, in that firm, actively until 1940 and then in the absence of several years, during the war period up to, as I recall, 1946.

Q. Now, during the period of time that you were with [225] Crowell, Weedon & Company, did you have anything to do with the municipal bonds of the City of Hawthorne? A. Yes, sir.

Q. What did you have to do with them?

A. I might state that I was in charge of the municipal bond department. That is a function of the business and as such, we were appointed as the fiscal agents for the City of Hawthorne in connection with proceedings, refunding proceedings covering their very special assessment bonds.

Q. What was the financial position of the City of Hawthorne at that time?

A. It was very much impaired by reason of substantially all the properties, due in part to the special assessment of bond discounts that had been formed and taxes levied which were delinquent.

Q. What did you do in connection with your employment as a fiscal agent for the City?

A. Among other things, one of our duties was to prepare an analysis of the City's financial position, showing the delinquent properties and the various bond discounts that were in default and a comprehensive analysis of facts that would be pertinent to the situation, and the purchase—I mean the purpose

(Testimony of Tad Travers.)

of which was preparatory to a refunding proceeding of the special assessment bonds and the subsequent restoration of the delinquent properties to the tax rolls. [226]

Q. What was the only source of the income of the City of Hawthorne with which to pay off these bonds?

A. I might answer your question by stating the principal or the prime source of revenue to discharge the debt would be the proceeds from the levy and collection of taxes on the special assessments, to provide the funds to service the debt. That would be the prime source.

However, there was an additional source. Under that schedule which incidentally, the most of these bonds which we are now discussing and for the purpose of this discussion we will identify as bonds, issued under the Municipal Bond Act of 1915—there were others, but we will confine our discussion to the 1915 bonds.

Now, in addition to the revenue or the source of revenue that I have just testified to, there was a secondary obligation in which the City was obligated to levy a tax in order to get ten cents on each \$100.00 of assessed valuation over the entire taxable property within the City, to provide additional funds to service these bonds.

Q. What steps, if any, did you take as the fiscal agent, to work out a refunding of these delinquent bonds?

A. As a result of our analyses and our recom-



(Testimony of Tad Travers.)

mendations and findings, we recommended to the City, one, that we hold a special election for the purpose of voting in the matter of bonds, to refund and pay off the existing default of the [227] special assessment bonds at fifty cents on the dollar.

Q. Now, in connection with your work at Crowell, Weedon & Company, did either Crowell, Weedon & Company or you, acquire any of these bonds?      A. We did.

Q. And after acquiring them, did you sell any of them?      A. Yes, sir.

Q. Were you in charge of that part of the office of Crowell, Weedon & Company that had control in this bond market?      A. Yes, sir.

Q. That was your responsibility in the firm, was it, Mr. Travers?      A. It was.

Q. Now, what, if anything, did you do as fiscal agent for the City to apprise the people of the City of Hawthorne of the program that you had outlined?

A. On numerous occasions, special meetings were called with the heads and members of the various departments, such as police, fire, water department and street department, meetings for the purpose of going over in some detail as to the problem on hand and the ways and means of accomplishing something to affect the refund of the special assessment bonds and restore the properties to the tax rolls. [228]

Q. Are you acquainted with Mr. M. R. Baumgardner, commonly known as Jack Baumgardner, seated here at the table with me?

(Testimony of Tad Travers.)

A. Yes, sir.

Q. How long have you known him?

A. I first became acquainted with Mr. Baumgardner around 1933 to my best recollection.

Q. And was that in connection with your duties as fiscal agent for the City of Hawthorne?

A. Yes, sir. With this explanation, that at that time I am sure, at the time I am speaking of, 1933 or thereabouts, I wasn't an officer of the City of Hawthorne, that is, as a fiscal agent and under contract of employment, but we were dealing actively in bonds at that time and were familiar with the City and had made recommendations to the City.

Q. Now, did you on any occasion during the years to 1930, when you were interested in the bond situation out there, did you sell any of these bonds—you personally—to Mr. Baumgardner?

A. I did.

Q. Did he pay for them?                      A. Yes, sir.

Q. Were there more than one series of bonds that had been issued?

A. Yes, there were quite a number of series, thirty or [229] something like that.

Q. Did you give me a figure?

A. In excess of thirty.

Q. Were there some series that, from a buyer's standpoint, were preferable to another series?

A. Yes.

Q. During those years in the thirties, did Mr. Baumgardner ever call you on the phone or talk to

(Testimony of Tad Travers.)

you and ask your advice or opinion as to which series might be the better one to buy?

A. He did.

Q. Now, in dealing with those bonds—first let me ask you, are those bonds registered bonds?

A. Registered bonds?

Q. Yes. A. No, they were coupon bonds.

Q. Coupon bonds? A. Yes, sir.

Q. Not registered? A. No, sir.

Q. Did you, at any time on one or more occasions, deliver bonds to the City Treasurer of the City of Hawthorne on a receipt basis?

A. Yes.

Q. Was that a common practice? [230]

A. Yes, sir.

Q. Can you recall whether or not on any occasions when you delivered bonds to the City Treasurer on receipt basis that you told the City Treasurer who was going to buy those bonds and who they were for?

A. I have no specific recollection. That was twenty some odd years ago.

Q. That is right.

A. I could not answer, no.

Q. You don't know? A. No.

Q. Do you know whether or not on any occasion when Mr. Baumgardner may have asked your opinion as to which would be the better series to buy, whether you told him or not that you could have bonds of that series delivered for him if he wanted them? A. Well, substantially, yes.

Q. Have you any idea now as to how many

(Testimony of Tad Travers.)

bonds Mr. Baumgardner may have purchased from you over the thirties, Hawthorne bonds?

A. I have no idea as to the specific amount, no.

Q. Well, would it be \$100,000.00 or \$1,000.00 or \$15,000.00 or \$20,000.

A. May I have a drink of water, your Honor?

The Court: Sure. [231]

The Witness: Well, it wasn't of any great material amount such as \$200,000.00 or so. If it were it would have registered. The best way I could answer that question is to say it would be a limited amount, maybe some place between \$15,000.00 to \$35,000.

When I am speaking of \$25,000.00 or \$35,000.00, I am speaking of the par value of these bonds which are seven per cent coupon tax exempt bonds, and while that was due and payable by the City, the market value of these bonds at that time, they were selling at ten cents, twelve cents and fourteen cents on the dollar, so I am referring to the amount as \$25,000.00 or \$15,000.00 or \$30,000.00 or \$35,000.00, and I am quoting from my memory.

Q. (By Mr. Bouchard): I understand.

A. But the amount I am referring to is the principal amount, which is the obligation to be paid, not the market value. I want to make that clear.

Q. That is right. I suppose the market value fluctuated? You could buy them at ten cents and if you held them long enough you could get thirty cents to the dollar?

A. A number of bonds in cities, other than Hawthorne, and including Hawthorne, trading at eight

(Testimony of Tad Travers.)

cents or ten cents were paid on a par and accrued interest basis, but whether those bonds [232] that I had sold to Mr. Baumgardner, whether or not any or all of these specific bonds were paid by the City at par and accrued or at a discount, if any, I have no way of knowing.

Q. But some of the bonds of the City of Hawthorne were paid off at par and accrued?

A. Yes, some of them were, I know that.

Q. The fact that these bonds were not registered means that they were freely transferable from hand to hand?

A. They had currency value, yes.

Q. They had currency value? A. Yes.

Q. During the thirties, Mr. Travers, were a good many, if you know, of the employees of the City of Hawthorne dealing in bonds of the City?

A. Now, when you say "a good many" I don't think there were a good many, and again I want to try to answer your questions but you must remember this is a long time ago and I want to be as factual as I possibly can, and be as directly responsive to your questions as I can.

You say "a good many?"

Q. Well, were there other employees that you personally know of in the City that were dealing in these bonds, Mr. Travers?

A. Yes.

Q. That is good enough. [233]

A. Yes, sir.

Mr. Bouchard: All right, that is all. Thank you, Mr. Travers.

(Testimony of Tad Travers.)

### Cross-Examination

By Mr. Sullivan:

Q. Mr. Travers, you testified that you sold bonds to Mr. Baumgardner?           A. Yes, sir.

Q. Did you sell bonds to him as a representative of Crowell, Weedon & Company, or did you sell your own personal bonds to him?

A. Crowell, Weedon.

Q. The records of these series of sales would be in the records of Crowell, Weedon & Company, would they not, Mr. Travers?

A. Yes. I will answer that question, yes.

Q. As fiscal agent for the City of Hawthorne between the years 1935 and 1940, did you know whether the City of Hawthorne from the records of the bondholders, that is, the people who purchased the bonds and the cost when you turned them in?

A. They would have kept records but for your information, these bonds were sold originally—they were sold both by underwriters and then distributed by the underwriter's again to various clients and in the process of collecting [234] bonds, one of the procedures would be to send these bonds in and to send these in by registered mail with draft attached, and in many cases the officers of the City would have no direct way of knowing specifically who was the owner of bond number so and so.

It may have been reflected in their books as coming from the bank or from dealers. The bonds would

(Testimony of Tad Travers.)

be recorded as being presented by a dealer or a bank as distinguished from the individual who actually owned them.

Q. Crowell, Weedon & Company was the fiscal agent for Hawthorne, starting in what year?

A. Either 1935 or 1936. I don't remember. It was thereabouts, either one of these two years.

Q. And prior to that time, was there much dealing by Crowell, Weedon & Company in Hawthorne bonds?

A. Yes, we were quite active in trading then, yes.

Q. When was Crowell, Weedon founded, if you know, Mr. Travers?

A. In 1932, February, March, or thereabouts in the year 1932.

Mr. Sullivan: That is all.

Mr. Bouchard: That is all, Mr. Travers, thank you.

The Court: You may be excused.

(Witness excused.)

Mr. Sullivan: Mr. Baumgardner, will you resume the [235] stand?

Whereupon,

M. R. BAUMGARDNER

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Sullivan:

Q. Mr. Baumgardner—

The Court: I don't think we can finish tonight. I would like to recess at 4:30 and come back tomorrow morning.

Mr. Bouchard: Off the record, Miss Reporter, please.

The Court: All right.

(Discussion outside the record.)

The Court: Back on the record.

Q. (By Mr. Sullivan): Let us see, we got up to I think 611 Truro—when did you live there, Mr. Baumgardner?

A. In the latter part of 1938 or somewhere in 1939.

Q. Where did you keep the money when you lived there? A. In my belt.

Q. All the time? A. Yes, sir.

Q. What denomination were the bills? [236]

A. Oh, I had \$50.00's and and \$100.00's.

Q. How big a packet did that make?



(Testimony of M. R. Baumgardner.)

A. Oh, like that (indicating) and you could turn them around.

Q. And you moved from 611 Truro to 443 East 129th Street?      A. I believe so, yes, sir.

Q. Where did you keep the money then?

A. I still carried it on me. I was always equipped with a gun and everything else. It was good protection.

Q. Why didn't you keep it around the house?

A. Well, I had been wheeling and dealing in bonds and one day I would have money and the next day I would not have money.

Q. When were you wheeling and dealing in bonds?      A. 1935 to 1939 possibly.

Q. Is this not the same time that you lived at 611 Truro and said that you kept it in a belt?

A. Yes, we moved there in 1938 or 1939. The other one was 303 East Delaware. That is where we hid it under the rug and I think that was in 1932 or 1933. I am positive it was.

Q. You testified you got that ring from your lodge?      A. Yes, sir, the lodge brothers.

Q. I think you testified that you got it——

A. I got it from eight of them. [237]

Q. Do you remember their names?

A. Does that make any difference?

Mr. Bouchard: I object to that question as being immaterial and not relevant to any issues in the case.

The Court: What is the materiality?

The Witness: They are all members of the Blue

(Testimony of M. R. Baumgardner.)

Lodge and none of them are gamblers and none of them are policemen.

Q. (By Mr. Sullivan): Can you give us their names? A. No, sir, I will not.

Q. Does that ring have any significance?

A. It is the ring I got when I became a 32nd degree Mason.

Q. To get back to the case on hand, how much cash on hand did you have in the year—at the date December 31, 1951?

A. I said \$3,000.00 or \$4,000.00, didn't I, already? I am not sure because I have been spending money on building houses, too, and my own home.

Q. Didn't you first testify that Mr. Vitello first visited you in 1952? A. Yes.

Q. And this cash in hand figure has been something that has been coming up in this tax investigation for three years [238] now? A. Yes.

Q. And you haven't yet been able to decide how much you had at certain points?

A. Well, I am in trouble with the Federal Government with my job in Hawthorne and I don't know what the dates were or what the monies were. I know that I am dealing with the Western Building & Loan Company. I cannot tell you because I wasn't going back and counting it every day.

Q. We are interested here with the amount of the cash you had on hand at the end of the years 1941 through 1951, Mr. Baumgardner.

Can you tell us the amount of cash you had on hand at the end of any one of these years?

(Testimony of M. R. Baumgardner.)

A. No, sir.

Q. These bonds that you purchased, did you purchase any of them direct from the City of Hawthorne?

A. No, sir, from some of the officials indirectly. We would make exchanges with series. I got all of mine from Tad Travers.

Q. Did you hold them until they matured?

A. No, sir.

Q. In the previous trial held in the Southern District of California, did you not testify on June, 1949, as follows:

Mr. Bouchard: What page? [239]

Mr. Sullivan: On page 46.

Q. (By Mr. Sullivan): "Q. Mr. Baumgardner, how much cash approximately did you have on hand, outside of the bank, in your home or in other places, in 1935?

"A. Well, I started mostly working with bonds at that time. Sometimes I had money and sometimes I didn't. I could not give you an answer because I don't know the exact date when I started with the bond redemption program out there, and I cannot answer that because if it was possible to buy bonds in those days, then the possibility was that I was down to nothing because I was buying any and all the bonds that I could get.

"Q. Is it your testimony then that sometimes you had money and sometimes you hadn't?

"A. That is correct.

"Q. Could there be a period of one year when

(Testimony of M. R. Baumgardner.)

you did not have any money?           A. Could be.

“Q. Two years?

“A. This, I think, carried through the years, I believe 1935 to 1939, or maybe 1940. I don't know the exact years. You buy bonds and you [240] lay them aside until they mature. They pay the money and you get your money and put it right back if you have an opportunity of buying more bonds.”

Do you remember testifying to that effect, Mr. Baumgardner?

A. Well, if it is on that transcript, I must have testified to it but I cannot remember exactly what it is all about. I am trying to give you the facts to the best of my honest ability. I don't think they even did mature. I don't think any of them have matured. If they did, I don't know anything about it.

Q. You testified that you bought them from Mr. Travers; who did you sell them to?

A. I bought them—I put them with the officials and they put them in the office and when the money was available they would get it.

Q. Who do you mean by “officials”?

A. Officials of the City of Hawthorne at that time.

Q. Mr. Baumgardner, you testified on direct examination that you put some articles, some assets rather, in the names of your children rather than in your own name; what was the reason for that now?

A. In case of false arrest.

Q. Were you ever sued for false arrest? [241]

(Testimony of M. R. Baumgardner.)

A. No, but almost everyone in Hawthorne was, except me.

Q. Why did you buy certain items in the childrens' names and yet other items in your own name?

A. There was no cash in their names, no cash period. It was always hidden. All they could have got was an automobile worth \$1,250.00 or something like that.

Q. When did you buy the automobile in your daughter's name, do you remember?

A. I believe it was in 1946, but I am not sure.

Q. At that time you had \$1,058.00 in the Peoples Federal Savings & Loan, \$991.00 in the Bank of America, commercial account; \$5,183.00 in the Bank of America, savings account. Didn't you think that——

A. I can tell you about that. I was using that car most of the time and the police department did not want it in my name, period.

Q. What was your purpose in buying Trust Deeds, Mr. Baumgardner?

A. Buying it at a discount.

Q. What was your purpose?

A. To get them to pay up and get the interest.

Q. To make money?           A. Yes.

Q. The purpose was investing—investment?

A. That isn't investment, is it?

Q. Yet, you did not think it necessary to report the income from it?           A. I did report it.

Q. What years did you report?

(Testimony of M. R. Baumgardner.)

A. I think it is all down on the reports and forms that I filed with the Federal Government.

Q. I show you Exhibit 5-E and ask you where on that you recorded any interest income or Trust Deeds or otherwise, Mr. Baumgardner?

A. I think I was paying interest that offset anything that I was getting here.

Q. You did not record it on here?

A. No, I just balanced my own books in my own mind. I don't think I was beating the Government. I think I was trying to be social and liberal. I don't think I was trying to beat anyone.

Q. And you stated that you got commission, that you received gratuities rather, for doing private investigations. Did you report that on your tax return?

A. I think that was covered under other moneys, that is the way I reported it on my income tax.

Q. What years did you receive these gratuities, Mr. Baumgardner?

A. I think I have mentioned them on the forms. [243]

Q. Do you know how?

A. I think the exhibits showed the years 1947, 1948 and 1949.

Q. Did you receive gratuities in any other years, Mr. Baumgardner?

A. No, I don't think so. I was in the fire department part of the time.

Q. How long have you been a police officer?

A. Twenty-nine and a half years.

(Testimony of M. R. Baumgardner.)

Q. At that time, you had only received these gratuities in 1947, 1948 and 1949; is that right?

A. Yes, sir.

Mr. Sullivan: Your Honor, it is now 4:30, and I am going to go into another matter, so I think this would be a good time to break now.

The Court: All right, we will recess until 9:00 tomorrow morning.

(Witness excused.)

(Whereupon, at 4:30 o'clock, p.m., November 30, 1955, the hearing in the above-entitled matter was adjourned to Thursday, December 1, 1955, at 9:00 o'clock a.m.) [244]

### Proceedings

The Clerk: The Court is in session.

Mr. Sullivan: Mr. Baumgardner.

Mr. Bouchard: Before Mr. Sullivan starts, your Honor, I would like to—I cannot find it—but in any event, yesterday I was handed a copy of an amendment to Respondent's answer and it is a copy of an amendment to Respondent's answer for the year 1947, proposing to increase the deficiency.

I suppose I should offer a formal reply to it, but I would like to have counsel state on the record the basis for the alleged increase. I have no idea what it is and I think I am entitled to that information.

The Court: Will you do that, Mr. Sullivan?

Mr. Sullivan: The deficiency is based on the

increased investment in the Beacon Cafe as shown by the testimony of James Staten. Mr. Staten testified that the \$5,760.00 was given to him by Mr. Baumgardner. We did not have this as part of Mr. Baumgardner's investment in the cafe.

Additionally there was \$2,000.00 handed to him, he said, as cash on hand. The book showed \$2,950.00 as additional investment and cash on hand, and we did not have him charged for that, so we increased the amount—we increased it by the amount of \$5,760.00 and \$2,950.00.

Mr. Bouchard: That is sufficient. It is a [247] sufficient statement as to what it is, yes.

The Court: Before we start, I would like to finish this case by noon.

Mr. Sullivan: I will only be about half an hour or an hour.

The Court: Thank you.

Whereupon

### M. R. BAUMGARDNER

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

### Cross-Examination

(Continued)

By Mr. Sullivan:

Q. Just when did you acquire the bonds, Mr. Baumgardner, the City of Hawthorne bonds that you were dealing in?



(Testimony of M. R. Baumgardner.)

A. Ever since they became available. It was, I believe, in 1932, 1933, 1934.

Q. Didn't you testify it was from 1936 to 1939 that you acquired the bonds in a previous trial?

A. No, I think I testified as soon as they were available, Mr. Sullivan.

Q. I direct your attention to page 6 of Mr. Baumgardner's testimony in the previous trial. This is on direct examination by Mr. Bouchard.

"Q. Now, Mr. Baumgardner, do you know, what, if any, [248] profit you made in buying and selling bonds of the City of Hawthorne?

"A. Do you mean the total amount of moneys?

"Q. Yes.

"A. I imagine it would run between \$12,000.00 and \$15,000.00.

"Q. And that was during what period of time?

"A. Oh, I would say from 1936 or 1937 until 1939, maybe 1940."

Do you not remember so testifying in the criminal trial, Mr. Baumgardner?

A. If it so states in that testimony, yes, sir.

Q. Are you changing your testimony now to say that you acquired them before 1936, 1937 or 1939?

A. I was under the impression that I testified also that I bought these as soon as they were available, Mr. Sullivan, and I have a pretty good memory.

Q. Before 1935 you had how much invested in bonds approximately? A. Almost all I had.

(Testimony of M. R. Baumgardner.)

Q. What would your best estimate of that amount be, Mr. Baumgardner?

A. \$2,000.00 or \$3,000.00.

Q. Yesterday I showed you Exhibit 5-E which I now show you and I asked you if there was any interest shown on this [249] return.

Your answer was—and correct me if I am wrong—to the effect that you paid out interest in about the same amount that year, so you thought they balanced off.

A. That is true.

Q. I direct your attention to Exhibit 1-A, the schedule of assets and liabilities.

A. Yes.

Q. You have no liabilities in the year 1946. I want to ask you now if you had additional assets on which you owed money, rather than what appear on there?

A. Well, I must have. I was buying property.

Q. In this proceeding we are attempting to determine your income by using the net worth method. If you had other assets, we are very much interested in finding out what they were.

A. They were probably liabilities instead of assets, Mr. Sullivan.

Q. Do you know what the liabilities were where you paid this interest in the year 1946?

A. Well, I was buying two or three pieces of property, and I was paying interest on those. In fact you mentioned one which I had forgotten about and which was the subject of mortgage. All I was allowed to pay was \$20.60 a month; that is [250] one.

(Testimony of M. R. Baumgardner.)

I might have others, but I cannot remember the names of them.

Q. I show you Syndicate Mortgage here in Exhibit No. 1-A, and note at the end of 1941, the balance was \$1,252.35, and at the end of 1942, the balance was \$246.15, and at the end of 1943 the balance was zero.

I ask you if that is the same Syndicate Mortgage interest payment you are talking about?

A. It must be.

Q. Then you did pay Syndicate Mortgage in 1946, interest to them, that is?

A. It is possible, whatever the years were.

Q. I show you Exhibit 3-C. You will note that 1946 the amount is \$1,093.39 interest income and is it your testimony that you had interest payments to offset that?

A. No, sir; not on this schedule, no, sir, but I had invested moneys.

Q. I think your testimony was, Mr. Baumgardner, that the commissions listed on your returns for the years 1947, 1948 and 1949 included interest income; is that correct?

A. Yes, sir; any and all moneys I made over and above my salary.

Q. Now, in 1950 and 1951, you did not report commission income, is that correct?

A. I was out of work for about a year. [251]

The Court: The fact that you were out of work would not have cut off whatever interest payments

(Testimony of M. R. Baumgardner.)

were being made to you, would it? It would not have any effect on your interest income?

The Witness: I believe in those years, your Honor, I was paying money all out and I wasn't making anything at all. I was building four houses plus my home and I wasn't making anything. Actually I was paying it all out, it was expenditure.

Q. (By Mr. Sullivan): I show you Exhibit 10-J. You have the City of Hawthorne listed for \$3,485.50. Isn't it true that you earned that income?

A. That was prior to August.

Q. But you earned that income in that year 1950? A. Yes.

Q. Isn't it true that you received \$626.18 interest income as shown on Exhibit 3-C?

A. That is what it says on the report.

Q. Is it true that in 1951 you earned \$6,061.70 from the City of Hawthorne as shown in the tax returns?

A. That is when they reimbursed me for my being out of work and reinstated me, and I paid income tax on that.

Q. Isn't it true that you did get paid from the City of Hawthorne? [252]

A. I always did get paid. I had twenty-nine years' service. I have never been convicted of anything. There never were any charges. There are some rotten politicians there, your Honor, who want me out and sometimes I got paid for a lot of times that I wasn't there.

(Testimony of M. R. Baumgardner.)

Q. Did you earn commissions from investigations in 1950 or 1951?

A. I have been in litigations ever since 1950. I do not believe I have ever had a chance to make a contact with any one, Mr. Sullivan.

Q. The costs of litigation are as stated in Exhibit 2-B, legal fees reinstatement \$800.00 in 1950 and \$370.00 in 1951, is that true?

A. I don't know whether your records are true or not. I cannot remember the figures but I have been paying out ever since I can remember in 1950, attorneys fees and all that goes with them.

Mr. Sullivan: Will you mark this as Respondent's Exhibit next in order for identification, please?

The Clerk: RR.

(The document above referred to was marked Respondent's Exhibit RR for identification.)

Q. (By Mr. Sullivan): I show you Respondent's Exhibit RR marked for identification and ask you if that isn't a copy of a letter [253] you wrote to the City of Hawthorne about the investigation in Gardena?

A. It speaks for itself.

Q. It is? A. Yes, it is.

Q. You admitted receiving investigation commissions in 1950 and 1951 in the amount of \$400.00 or \$500.00?

A. I will give the exact testimony here as I did in the criminal case.

The Court: What was that?

(Testimony of M. R. Baumgardner.)

The Witness: I was doing some investigation for Fred Carr, who owned the buildings. Fred Carr did say he would give me \$400.00 or \$500.00 to conduct this investigation. He promised me and promised me; I have seen him a dozen times—that during his investigation he would pay me, but he was always too drunk, so the way he died, well, probably he bought twelve cases of whisky and locked himself in his room and he died there and I have never got his money.

That is when the Hawthorne Press and the rotten politicians who are in the job now were doing everything to have me dismissed. I was dismissed without charges and had to go to the Appellant Court of California to get reinstated. I did write that letter.

Q. (By Mr. Sullivan): Do you understand the verb “receive” to be the present [254] tense?

A. I don't know what you mean.

Q. This club is it a——

A. It is a poker club.

Mr. Sullivan: At this time, your Honor, I would like to offer Exhibit RR for identification in evidence.

Mr. Bouchard: No objection.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit RR was received in evidence.)

Q. (By Mr. Sullivan): What years were you doing the extra work in the movies that you testified you received \$40.00 a day for?

(Testimony of M. R. Baumgardner.)

A. I started in 1928 and probably ended up in two or three years.

Q. Do you now recollect how much money you made in any of those years?

A. No, it would average about \$40.00 a day any time I was there.

Q. Did you work one day?

A. It all depends on what the picture was.

Q. Did you report this on your income tax returns, Mr. Baumgardner?

A. No, sir.

Q. You testified on direct examination [255] that you expended money to renovate houses at 158 and 162 Ramona and at 611 Truro?

A. Yes, sir.

Q. Do you remember what year you spent money to renovate 158 Ramona?

A. It was in the beginning when I bought it. I don't know the date or the year even. The whole thing was riddled with termites. I could not sell it until I had repaired it, so I started to do that.

Q. Did I understand your testimony that after that—you kept the money in the house until 1932 and after that you carried a money belt?

A. Yes, sir.

Q. Is that the same way that you testified in the criminal trial?

A. I don't know what I testified. I think I said I kept it around the house. I don't think there was any place mentioned except on one particular occasion.

Q. I direct your attention to questions that

(Testimony of M. R. Baumgardner.)

were asked in the previous trial and ask you if you testified as follows:

Mr. Sullivan: This is page 40, Mr. Bouchard.

Mr. Bouchard: Thank you.

Q. (By Mr. Sullivan): "Q. (By Mr. Hockman): At the end of 1946—— [256]

"A. Well, 1946——

"Q. The end of 1946?

"A. I don't remember. You are going back too far.

"Q. Where did you keep the money, sir?

"A. All over the place.

"Q. Under the rug?

"A. All over my house. Pardon me, your Honor, under the rug, in coffee cans and in tobacco cans. In fact, I had it all over the house, any place I could hide it."

Did you so testify in the criminal trial, Mr. Baumgardner?

A. Yes, I did.

Q. You did not mention the money belt in the criminal trial, did you? A. No, I did not.

Q. Did you forget about it?

A. No. I got quite a bit of publicity so I stuck with it because it was true. No one wants to believe the truth, but I stuck with it.

Q. When did you keep—strike that, please.

When did you complete your dealings in bonds in the City of Hawthorne?

A. In the latter part of 1949 or close to it.



(Testimony of M. R. Baumgardner.)

Q. You mean 1949? [257]

A. 1939. I don't think it was in 1940. I think it was completed in 1939.

Q. Isn't it true that you applied for a loan of \$200.00 from the Bank of America in 1937 and were turned down, Mr. Baumgardner?

A. It could be.

Q. Did you apply for a loan of \$200.00 in 1938 to make a trip on vacation to Oklahoma?

A. It could be. I tell you I bought so many bonds, I hadn't a nickel.

The Court: Do you mean those bonds were not sufficient security to apply for a small loan?

The Witness: Mr. Posterweight and Mr. Travers came out in 1942 or 1943 for the City of Hawthorne doing research on bond redemptions. I was assigned as a sergeant to haul Mr. Posterweight and Mr. Travers to any and all meetings or places for the purpose of picking up City of Hawthorne bonds.

After they had been appointed as fiscal agents of the City of Hawthorne, the City Council and the City attorney and the two special agents or the fiscal agents sat down and drew up condemnation proceedings against any and all dwelling properties, which I think was fifty-five per cent delinquent in the City of Hawthorne.

After this condemnation proceedings was finished, then they advertised that an auction would be held and at [258] that time all properties that were listed would be sold at an auction, and all such

(Testimony of M. R. Baumgardner.)

moneys taken in from the auction would be used to pay off those City of Hawthorne bonds, 1959.

City employees, such as policemen, firemen, treasurer, city clerk, building inspector, city attorney and all the council did participate in the buying of these City of Hawthorne bonds, which took a period of years.

All pieces of property were auctioned off and that is the way the money was handled and the way we were paid on our bonds and why it took so long.

The Court: You held them until the property was sold?

The Witness: Yes.

The Court: And then when some of the bonds came in——

The Witness: In other words, we were close enough that they would say, "How many of these do you want"?

And I would call Mr. Travers, whatever they were, and say, "Which series are the best to take"?

When these things came along and they did pay me so much money, I would take it right back in bonds.

Q. (By Mr. Sullivan): Did you testify that when you prepared your 1951 return, you did not know about your interest in the Embassy Club proposition? [259]

A. All I knew is what Mr. Vitello told me.

Q. Mr. Vitello did not contact you until August of——

A. 1952.

Q. It was received by the Government on March

(Testimony of M. R. Baumgardner.)

17, 1952; at the time you prepared your return to forward it to the Government, did you know anything of your interest in the Embassy Club?

A. I had heard about it through the Grand Jury of Los Angeles County.

Q. On direct examination you stated substantially that you did not put money in banks because you were afraid you would be sued for false arrest, is that correct?

A. Yes, sir.

Q. When was this period that you had this fear of being sued for false arrest?

A. Up until the time I started putting up the buildings and putting my money into buildings.

Q. Do you have any idea when that period was?

A. I don't know. As soon as I started getting a little money on the bonds, I might have had enough in there to take over things but it never got too big until I was building the four places and my home. I was in and out of there and the Deeds and mortgages were paying off.

Q. Then you lost your faith in banks, is that right, Mr. Baumgardner? [260]

A. Yes, sir.

Q. Who handled the vice matters in Hawthorne with the police department, when you were chief of police, Mr. Baumgardner?

A. I did.

Q. You testified on cross-examination yesterday that in 1946 the De Soto was put in the name of your daughter because you used it in police work?

A. I believe that was the year. I have always done it since that. It made it double or treble for

(Testimony of M. R. Baumgardner.)

the cost of insurance if you had put it in your own name, so I put it in my daughter's name.

Q. How old was your daughter at this time in 1946, Mr. Baumgardner?

A. She is eighteen now. I am not very good at figures.

Mr. Sullivan: That is all.

Mr. Bouchard: We are going to finish by noon all right.

I think perhaps it is fair to point out to your Honor that what is in this record is just information, of course, at this stage.

In the exhibit showing the schedule of interest income which was stipulated was earned by the Petitioner in the year 1950, the total amount is \$626.18. The Commissioner [261] has determined, in determining the tax liability of the Petitioner, that during that year, 1950, he was entitled to additional deductions which did not appear in his return in the amount of \$1,728.00. That appears in the deficiency letter which is part of the record in this case.

In 1951 the interest earned by the Petitioners and credited in the bank account is the sum of \$550.53 and the Commissioner in his deficiency letter has determined that the taxpayer is entitled to an additional deduction for taxes and legal fees of about \$834.13, which he did not take into account.

Mr. Baumgardner just one or two questions.

(Testimony of M. R. Baumgardner.)

Redirect-Examination

By Mr. Bouchard:

Q. Do you belong to any service clubs in the City of Hawthorne?      A. Yes, sir.

Q. What clubs?      A. The Brotherhood Club.

Q. How long have you been a member of the Rotary Club, Mr. Baumgardner?

A. Eighteen years.

Q. Are you still a member?      A. Yes.

Q. I understand you met Mr. Travers while acting as his [262] chauffeur in connection with the Hawthorne affairs?      A. That is right.

Q. Did you buy any of these Hawthorne bonds from anyone at Crowell, Weedon other than Mr. Travers?

A. I bought them all from Mr. Travers.

Q. Now, there was some testimony by Mr. Vitello to the effect that Mr. Baumgardner told him that you were quite a gambler; are you?

A. I do not even know one card from the other. I back a horse once in a while.

Q. You bet on a horse now and again?

A. Yes.

Q. Do you ever go to Las Vegas?

A. Yes, once in a while.

Q. But you are not a gambler?

A. No, sir; I don't know the slightest thing about it. Let me correct that. I do know draw poker

(Testimony of M. R. Baumgardner.)

from stud poker, what they are playing but I do not know how to play it.

Q. You told Mr. Sullivan in answer to one of his questions that you could not tell him the amount of cash you had on hand at the end of any one year starting with 1941. Can you make any reasonable estimate?

A. I testified in the criminal court that it was \$6,000.00, \$8,000.00 or \$10,000.00. I don't know exactly what it was. [263]

Q. Did you know at the end of each of the years involved in this proceeding that you had more and substantially more cash on hand than \$100.00?

A. I always had \$6,000.00, \$8,000.00 or \$10,000.00. After I got into this bond business I never had anything in my pocket.

Q. Let me ask you this. I think you have indicated it perhaps but I want to be sure and get it established in the record.

Was there, during the years 1930 and 1931 which are the years when this redemption program of the Hawthorne City bonds was being worked out, was there a good deal of trafficking in these bonds by police officials and employees of the City of Hawthorne?

A. Yes, sir; all that had any money at all. In fact, they were holding these meetings so that the public could get aware of it and participate in it if they wished.

Mr. Bouchard: In the interest of saving time, may I approach the witness?

The Court: Certainly.

Mr. Bouchard: That is all, your Honor.

Mr. Sullivan: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Bouchard: I know your Honor is waiting for me [264] and I thought I had something I wanted to do and I will probably get half way down the street and remember it, but I think, your Honor, I will have to say that that is all.

The Court: Mr. Sullivan, do you want to file the amended answer or have you done that?

Mr. Sullivan: I filed it with the Clerk yesterday.

I would like at this time to have it stipulated that if Mr. Perkins was called as a witness, he would testify as follows—

Mr. Bouchard: I would like one further stipulation with respect to that and that is that Mr. Perkins is no longer employed by Crowell, Weedon and since that, Crowell, Weedon doesn't have records prior to the year 1936 with reference to these Hawthorne bond transactions, is that correct?

Mr. Sullivan: That is correct.

Mr. Bouchard: All right.

The Court: His testimony will be admitted.

The Clerk: SS, your Honor.

(The document above referred to was marked Respondent's Exhibit SS and received in evidence.)

Mr. Sullivan: That is all for the Respondent, your Honor.

The Court: I would like to dispose of this case by deciding it from the bench but I am not going to because [265] there are so many stipulations.

Mr. Sullivan: I was just going to make such a motion and ask your Honor if he would give——

The Court: Sixty days for filing briefs and thirty days to reply.

Mr. Bouchard: Very well, thank you.

The Clerk: Thank you, gentlemen.

The Clerk: If your Honor, please, counsel for the Respondent has charge of all the exhibits 1-A through 17-Q and Respondent's Exhibits R through SS.

That is the complete calendar setup for this session for the Court in Los Angeles.

(Whereupon, at 9:55 o'clock a.m., Thursday, December 1, 1955, the hearing in the above-entitled matter was closed.)

Filed December 12, 1955, T.C.U.S. [266]



[Title of Tax Court and Cause.]

Docket Nos. 49897, 49899

### CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 21, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review," including joint exhibits 1-A to 17-Q, inclusive, attached to stipulation of facts, respondent's exhibits R to Z, inclusive, AA to EE, inclusive and GG to SS, inclusive, (FF marked for identification only and not left with record), in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 3rd day of December, 1956.

[Seal]      /s/ HOWARD P. LOCKE,  
Clerk, Tax Court of the  
United States

[Endorsed]: No. 15397. United States Court of Appeals for the Ninth Circuit. Milford R. Baumgardner and Pearl E. Baumgardner, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed December 17, 1956.

Docketed: December 24, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

No. 15397

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MILFORD R. BAUMGARDNER and PEARL E. BAUMGARDNER,  
*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

---

Petition to Review a Decision of the Tax Court of the  
United States.

---

APPELLANTS' OPENING BRIEF.

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FILED

JUN - 1 1957

PAUL P. GIBBEN, CLERK



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No. 15397

IN THE

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FOR THE NINTH CIRCUIT

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MILFORD R. BAUMGARDNER and PEARL E. BAUMGARDNER,  
*Petitioners,*

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COMMISSIONER OF INTERNAL REVENUE,  
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---

**Petition to Review a Decision of the Tax Court of the  
United States.**

---

**APPELLANTS' OPENING BRIEF.**

---

**Jurisdictional Statement.**

This is an appeal from a decision of the Tax Court of the United States, findings of fact, and opinion of the Tax Court, which will be found in the Transcript of Record at pages 43 to 57. This Court has jurisdiction under the provisions of Section 7482 of the Internal Revenue Code of 1954.

**Statement of the Case.**

The deficiency letters were mailed to each of the taxpayers May 11, 1953. In each petition it is alleged that the proposed additional assessments for all years except 1950 and 1951 are barred by the provisions of Section

275 of the Internal Revenue Code of 1939. Respondent concedes this fact unless he proves fraud as to any year or with respect to the years 1948 and 1949 he proves that the taxpayers omitted from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the returns [Tr. p. 66].

Respondent's counsel in his opening statement stated that the respondent's case is a net worth case, and that the deficiencies and statutory notice were set up on a net worth basis, with the exception of the years 1944 and 1949, where the deficiencies were set up for specific items of unreported income [Tr. p. 67].

The parties have stipulated many facts, one of which is Exhibit 1-A, showing the assets and liabilities of petitioners during the years 1942 to 1951, inclusive. This exhibit was prepared by respondent (Stipulation of Facts, Par. 2). There is in dispute with respect to that exhibit three items:

- (a) Cash on hand at the beginning and end of each year;
- (b) Investment in the Beacon Cafe; and
- (c) Investment in the Embassy Club.

Petitioners are husband and wife and reside in Hawthorne, California. Joint returns were filed for all years, except 1945 and 1947, for which years separate returns were filed. The issues involved relate to transactions involving only the husband and he will be referred to as "petitioner".

Petitioner, during all of the years involved, was Chief of Police of the City of Hawthorne, California. He came to California from Oklahoma in 1924, and at that time had saved \$2,000 or \$3,000. He went to work as a fire-



man in the Hawthorne Fire Department at a small salary and worked nights at a restaurant. He was married to petitioner wife in 1927. They have two children. He went to work for the Police Department in Hawthorne in 1930. In 1937 he became Chief of Police and occupied that position until his retirement in June, 1953, except for a short period hereinafter referred to. During the early days he worked as a motorcycle escort in motion pictures, earning \$40 per day when he worked.

Mrs. Baumgardner has lived in Hawthorne since 1919, growing up and going to school there [Tr. p. 202]. She did not know how much money her husband had when they were married, but knows he had some, as she was not dependent upon his salary [Clk. Tr. p. 202].

In the early 1930's, the City of Hawthorne was in financial difficulties by reason of the fact that a substantial part of its real estate had been removed from its tax rolls because of the default of special assessment bonds. It was necessary to work out a refunding program of these bonds so that delinquent properties could be restored to the tax rolls [Clk. Tr. pp. 250-253]. The City of Hawthorne employed Crowell, Weedon & Co., a well known investment house in Los Angeles, as its fiscal agent to work out its refunding operations. Mr. Tad Travers was in charge of the Municipal Bond Department of that company and, as such, handled the refunding operations referred to [Tr. p. 250].

Mr. Travers was with Crowell, Weedon & Co. from 1932 to 1946, except for the War years. Since then he has been president of the Brookline Oil Company of California. He testified that on numerous occasions special meetings were called with the heads and members of the various departments of the City, such as the Police De-

partment, the Fire Department, the Water Department, and the Street Department, for the purpose of going over in detail the problem of the City and explaining the methods developed to refund the delinquent special assessment bonds and restore properties to the tax rolls [Tr. p. 253].

Both Crowell, Weedon & Co. and Mr. Travers bought some of these bonds. They were selling at ten to fourteen cents on the dollar, but the City was obligated to pay them off at par [Tr. pp. 251, 256]. There were some thirty or more different series of bonds and, from a buyer's standpoint, some series were preferable to others [Clk. Tr. p. 254]. The bonds were all bearer bonds and freely transferable; they were all tax exempt, and some of them were paid off at par [Tr. p. 256].

In 1933, Travers met petitioner, and he testified that in the period 1933 to 1939 there were substantial dealings in these bonds. He personally sold some of these bonds to petitioner and estimated that he sold him anywhere from \$15,000 to \$35,000 par value of these bonds. He also advised petitioner on various occasions which series were most desirable for him to buy. He knows personally that other employees of the City of Hawthorne were dealing in these bonds [Tr. p. 257]. Petitioner says there was very active trading in these bonds by City employees [Tr. p. 224].

During that period (1932-1939), petitioner made a profit of from \$15,000 to \$16,000 in buying and selling these bonds and had that amount of cash on hand at the beginning of the opening net worth period [Tr. p. 224].

From 1935 on, petitioner bought real estate and trust deeds on real estate with the monies realized from the sale of Hawthorne bonds [Tr. p. 225]. He received

rents from such real estate and interest on the trust deeds. The interest was not paid to him directly but was paid to the bank and by it credited to his savings accounts. Petitioner had no source of income during the years involved, except salary from the City, profits on the sales of real estate, rents from real estate, interest from trust deeds, and a small amount of dividends.

In the net worth statement for 1951 [Ex. 1-A] is included the amount of \$673.06, alleged to be petitioner's investment in the Embassy Club, a legalized poker parlor in Gardena, California. The undisputed testimony of Mr. Archie Sneed, general partner of the Embassy Club, is to the effect that on or about January 1, 1951, he gave petitioner a 5 per cent interest in the Club at no cost. Petitioner therefore had no investment in the Club and it should not appear as an asset. In fact the respondent's evidence provided that it was not an investment and, if subject to tax at all, it is because of petitioner's distributive share of the partnership income for the period June 1, 1951, to December 31, 1951. This is based on the testimony of witness Pool, a certified public accountant, who prepared the partnership returns for the Embassy Club and mailed petitioner some time during March, 1952, a letter stating that the amount of \$673.06 was his distributive share of the partnership income for that period. Petitioner did not include it in his return for 1951 for the reason that he did not receive any part of it [Tr. p. 227].

Petitioner kept no books or records and the respondent determined his net taxable income for all years except 1944 and 1949 by the net worth and expenditures method; as to 1944 and 1949 he relies on specific items of income which he alleges were omitted from the returns. The re-

spondent's opening net worth statement is in error, as it does not adequately account for beginning cash on hand in an amount not less than \$12,000, and perhaps \$15,000 or \$16,000, realized from the purchase and sale of Hawthorne Municipal Bonds. It recognizes only the sum of \$100 in each of the years 1940 to 1951, inclusive.

Petitioner was indicted in the United States District Court for the Southern District of California for alleged tax evasion for each of the years 1947 to 1951, inclusive. He was acquitted on all counts [Tr. pp. 190, 191]. In each of the petitions it is alleged that the assessment of additional income taxes for all years, except 1950 and 1951, is barred by the provisions of Section 275 of the Internal Revenue Code of 1939. Respondent concedes that all years prior to 1950 are barred by limitations unless he sustains his burden of proving fraud, except he says 1948 and 1949 are not barred if he proves petitioner has omitted from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the return.

### **Questions Presented.**

1. Do the rules announced by the United States Supreme Court for the guidance of courts in criminal prosecutions for tax evasion under the net worth method apply to civil cases where the same method is used?

2. Has the Government sustained its burden of proof by clear and convincing evidence that the income tax returns filed by petitioners for the years involved were fraudulent and filed with intent to evade tax?

## ARGUMENT.

- A. The Principles Set Forth by the United States Supreme Court in the Case of *Holland v. United States*, 348 U. S. 121, That "Proof of a Likely Source From Which the Jury Could Reasonably Find That the Net Worth Spring" Are Not Limited to Criminal Actions but Are Equally Applicable to Cases Involving Civil Fraud Penalty or Routine Cases of Deficiency.

In the *Holland* case the Court described the net worth method as follows:

"In a typical net worth prosecution the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an 'opening net worth' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, *when taken in connection with direct evidence of 'conduct, the likely result of which would be to mislead or conceal.'* *Spies v. United States*, 317 U. S. 492, 499." (Emphasis is added.)

The Supreme Court recognized that the use of this method was exceedingly dangerous: ". . . it is so

fraught with danger for the innocent that the courts must closely scrutinize its use. . . .” (*Holland* at p. 125), and warned strongly of the care with which trial and appellate courts should conduct themselves. Trial Courts, said the Court,

“should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute.” (*Holland* at p. 129.)

Appellate courts must also exercise the greatest of care:

“Appellate courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.” (*Holland* at p. 129.)

The decisions of the Supreme Court in the *Holland* case and its companion cases (*Friedberg v. United States*, 348 U. S. 142; *Smith v. United States*, 347 U. S. 147; and *United States v. Calderon*, 348 U. S. 160) laid down certain rules revolving around a consideration of the following questions:

1. What restrictions are there on the right to use the net worth method?
2. What proof of a starting point net worth is necessary?
3. How far must the Government go in establishing that the increase in net worth is attributable to taxable income rather than non-taxable receipts?
4. What constitutes proof of “willfulness”?

On the starting point net worth, the Court said:

“We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer’s assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.” (*Holland* at p. 132.)

On the taxable nature of the increase, the Court said:

“Also requisite to the use of the net worth method is evidence supporting the inference that the defendant’s net worth increases are attributable to currently taxable income . . .

“Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient.” (*Holland* at pp. 137-138.)

On the necessity of proving willfulness, the Court said:

“The petitioners contend that willfulness ‘involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.’ This is a fair statement of the rule.” (*Holland* at p. 139.)

In this case the respondent realized that in order to make his net worth computation effective, he had to show a probable or likely source of income other than that admitted by the taxpayer. In this attempt he produced the evidence of a prostitute and a pimp. That testimony need

not be discussed for the reason that the Tax Court, in reaching its conclusion, stated that it had not been influenced by the testimony of these two witnesses to the effect that they paid so-called "protection money" to enable them to operate a house of prostitution free from police interference [Tr. p. 56]. It may be pointed out, however, that neither of these persons testified to any protection payments to the petitioner. The unreliability of this sort of evidence is pointed out by the Fifth Circuit in *Ford v. United States*, 210 F. 2d 313 at pages 317 and 318, wherein the Court said:

"The appellant next insists that the Court erred in admitting the testimony of Margaret Lera, who had operated a house of prostitution in Galveston since 1941. Over the defendant's objection, she testified that in 1943 she left \$100 in cash 'at the defendant's office,' that starting the latter part of 1945 and continuing through May of 1947, she made regular payoffs 'to the police department' of \$100 per month. The nearest she came to connecting the defendant with the payoffs was by a conversation in 1949 when she testified that defendant requested her aid in a political campaign on the ground as stated by him that 'he had been good to me through the years.' The defendant moved that her entire testimony be stricken as having no probative value. There was no sufficient proof that the defendant received the payoffs or any part of them, and a conclusion to that effect cannot be permitted to be based upon mere conjecture or suspicion. We have previously had occasion to comment on the necessity for safeguarding a defendant against the prejudice and danger inherent in this type of testimony. *Montgomery v. United States*, supra, 203 F. 2d at page 891. The Government insists that the testimony was relevant on the question of willful



intent and to show a possible source of income, citing *United States v. Skidmore*, 7 Cir., 123 F. 2d 604, 608; *Tinkoff v. United States*, 7 Cir., 86 F. 2d 868; and *United States v. Sullivan*, 2 Cir., 98 F. 2d 79. None of these cases would justify the admission in evidence of this vague kind of testimony to point the finger of suspicion at the defendant as the perpetrator of a different criminal offense and one involving moral turpitude.

“The evidence sufficiently disclosed that in the defendant’s office of Chief of Police he had opportunities of receiving income from graft, payoffs, or other illegal sources. There can, of course, be no presumption that the defendant was guilty of such gross misconduct as to be the recipient of such ill gotten gains. The presumption is to the contrary. It was nevertheless within the jury’s province to say whether that presumption had been overcome, or to infer that the defendant had some other source of income, from the testimony that the expenditures so far exceeded the available resources disclosed by the evidence, and from the evidence that such expenditures could not be accounted for by accumulated assets or by nontaxable receipts. But to undertake to aid the jury in this function by the admission of testimony of this woman as to payoffs with which the defendant was not shown to be connected was both erroneous and highly prejudicial.”

There was no other evidence in the record indicating a likely source of taxable income.

The Special Agent, after completing an extensive investigation, called on petitioner at his office in the Police Station at Hawthorne in August of 1952, and advised him he was making a routine check of petitioner’s tax

returns. He discussed matters generally with petitioner and asked if he had any records. Petitioner told him that whatever records he had were at his home and he was at liberty to go to his home and his wife would produce everything they had [Tr. p. 189]. On a later occasion he was given access to petitioner's safe deposit box [Tr. pp. 189-190]. The Special Agent's testimony as to the cooperation he received from petitioner indicates that the latter had nothing to fear from any investigation [Tr. p. 189]. At one of their meetings petitioner advised the Special Agent that he had made \$15,000, \$16,000 or \$18,000 on the sale of municipal bonds during the thirties [Tr. p. 167]. The Special Agent went over to the City Treasurer's office and when he found no record there of petitioner's having purchased bonds, he discounted the story and made no further investigation and did not give petitioner credit for that statement [Tr. p. 198]. Accordingly he made the arbitrary determination in all of the years involved that petitioner had on hand at the beginning and end of each year only the sum of \$100. These municipal bonds were bearer bonds, freely transferable from hand to hand [Tr. p. 256], but whether the agent knew this is not disclosed by the record. It is fair to assume, in the light of the cooperation the agent received from petitioner, that had he gone back to petitioner and advised him of the fact that he was not listed in the office of the City Treasurer as being the purchaser of bonds, he could have gotten the information that is disclosed by the record in this case. Petitioner realizes that this or any other Court might give very little credence to uncorroborated testimony of accumulation of cash which does not go through a taxpayer's bank account. In this case, however, the taxpayer's story is corroborated by

Mr. Ted Travers, who, during the thirties, was a partner in Crowell, Weedon & Company in Los Angeles, the company that had charge of the refunding operation of the City of Hawthorne bonds [Tr. p. 250]. Mr. Travers, at the time of trial, was president of the Brookline Oil Company of Los Angeles. He testified that he knew of his own knowledge that many of the employees of the City of Hawthorne were buying and selling bonds and that he, himself, sold some bonds to petitioner and advised him on several occasions as to what series of bonds he should buy [Tr. pp. 250, 255]. Petitioner testified that he made several thousand dollars during the thirties in the purchase and sale of these bonds. His testimony is corroborated by the man who was employed by the City of Hawthorne and was in charge of its refunding operations. The City of Hawthorne is a small city of approximately 28,000 people. Petitioner had lived there for some thirty years; had been the Chief of Police since 1937; was a 32nd degree Mason; a member of the Rotary Club for more than eighteen years, a member of the Baptist Church and the president of the Men's Brotherhood of that church. His testimony is worthy of belief.

The Tax Court believed the petitioner's testimony as corroborated by Mr. Travers and made an arbitrary determination that petitioner did have cash on hand in the amount of \$5,000 on December 31, 1940, and at the end of each of the years 1941, 1942, 1943 and 1944, and that at the end of each of the taxable years thereafter he had cash in the amount of \$3,000 [Tr. p. 54]. This is an arbitrary determination by the Tax Court, but in any event shows that the petitioner met his burden of proof as to the cash on hand at the beginning of the taxable period and that the net worth computation relied upon by the respondent is erroneous.

Upon briefs before the Tax Court the principal case relied upon by the Government was that of *Constantine Thomas*, Tax Court Memo. 1955-46, which was a net worth case tried by the same judge that tried the case at bar. On appeal the *Thomas* case was reversed by the Court of Appeals for the First Circuit. See *Thomas v. Commissioner*, 232 F. 2d 520. The Court rejected the Commissioner's contention that the taxpayer's corporation was a possible source of taxable income to account for his increases in net worth. It held that there had to be some independent showing that the corporation might be the source of the unreported income, not merely a negative inference arising from prior assumptions that the increases were taxable, and therefore must derive from the corporation, since no other taxable source was apparent. The Government did not request certiorari in this case.

In *United States v. Ford*, 237 F. 2d 57 (C. A. 2d, 1956), the Court, in a prosecution for willful invasion of income taxes based upon the net worth method, held that evidence showing the means by which the Government determined opening net worth, without including any credit for currency on hand, presented a jury question as to whether such determination made evidence of net worth so unreliable as to lack any probity as foundation for calculation of unreported income, the Court holding apparently that proof of a likely source was not needed—that it was sufficient to prove some source without proof of any particular probable source. Judge Frank dissented. The Supreme Court granted taxpayer's petition for writ of certiorari February 25, 1957.

In *Massei v. United States*, 247 F. 2d 895 (C. A. 1st, 1957), the First Circuit had before it a prosecution for

willful invasion of income taxes which involved the use of the net worth method. The Court of Appeals reversed. At the Government's request, the Supreme Court has granted certiorari in this case.

**B. The Government Failed to Sustain Its Burden of Proof by Clear and Convincing Evidence That the Income Tax Returns Filed by Petitioners for Any of the Years Involved Were Fraudulent and Filed With Intent to Evade Tax.**

In the opening statement of respondent's counsel, he set forth the evidence he expected to offer to prove fraud. He said:

"In addition to the evidence of net worth, the Respondent will also introduce evidence in his opinion, which will show fraud. We expect to show that the Petitioners had little or no cash on hand at the beginning of the net worth period, the starting point. We expect to introduce evidence that will indicate a course of conduct in the earlier years which is inconsistent with the large cash hoard.

"We further expect to introduce evidence showing the concealment of assets, the omission of income from the return, and omission of rental income, dividend income, interest income and income from a bar and restaurant, a poker club.

"We will also show the unreporting of capital gain and concealment of income items from the accountant preparing the returns." [Tr. p. 68.]

As to the cash on hand, the Tax Court found against respondent. He determined that petitioner had cash on hand at the end of each of the taxable years of \$100. On the other hand, the Tax Court found that he had cash in the amount of \$5,000 on December 31, 1940, and at

the end of each of the years 1941, 1942, 1943 and 1944, and that at the end of each of the taxable years thereafter he had cash in the amount of \$3,000.

As to the petitioner's conduct in earlier years, the evidence showed that in 1938 he applied to the bank for a \$200 loan to take a vacation trip, and on his application for said loan he showed an obligatoin to a department store which was being paid off in monthly installments and one to a furniture company. On his application he listed no other source of income other than from the Police Department. In January of 1939, he negotiated a loan for \$480 to refinance a used car, agreeing to make payments of \$32 per month. He listed as his only source of income his salary from the Police Department. An examination of his bank accounts showed little activity, with no large balances and no large deposits or withdrawals during the years 1940 to 1944 [Tr. pp. 46-47]. Although the Special Agent had been told by petitioner that he had invested in Hawthorne municipal bonds and made substantial amounts, the Agent gave him no credit for his statement when he did not find petitioner's name listed as a purchaser on the records of the City Treasurer [Tr. p. 198]. The Tax Court, however, said:

“We are willing to believe that petitioner did invest in these bonds which at the time sold for as little as ten to fourteen cents on the dollar. His testimony in this respect is corroborated by the witness Travers who was in charge of the Municipal Bond Department of a Los Angeles investment firm which dealt in the Hawthorne bonds.” [Tr. p. 53.]

On this basis the Tax Court made an arbitrary determination of cash on hand at the beginning of the net worth period, which was fifty times larger than that determined by the respondent.

With respect to the alleged income from a bar and restaurant, the respondent sought to show that petitioner was a silent partner owning fifty per cent in a restaurant known as the Beacon Cafe. The value of this interest was included by respondent in petitioner's net worth statement at some \$16,000. The Tax Court found as a fact that the petitioner had no interest in this cafe and eliminated it as an asset in the net worth computation [Tr. p. 54].

With respect to the alleged income from a poker club which was known as the Embassy Club, in the City of Gardena, California, there is no dispute about the fact that petitioner became a five per cent owner in January, 1951, by a gift from one of the general partners. On December 31, 1951, there was a balance of \$673.06 in petitioner's capital account in the Club, and in March of 1952 the accountant for the Club wrote petitioner a letter showing the amount of his distributive share of partnership income which he said should have been reported for income tax purposes to be \$1,164.54. Petitioner says he did not report that or any other amount from the Club for the simple reason that he did not receive any income. Assuming that he should have reported it, the reason for not doing so would seem to be a valid reason, and certainly his failure to report that amount when he did not receive it does not prove that the omission was fraudulent.

With respect to concealment of assets, suffice it to say that there is just no evidence of such concealment. All of petitioner's assets shown in the net worth statement consisted of real estate standing in the name of himself and his wife.

In respect to the reporting of capital gain, there is no claim that the petitioner sold property and did not report a profit. Respondent's only claim is that he did not report

sufficient profit. For example, in the year 1945, the respondent determined a long-term capital gain of \$2,679.52 instead of \$1,128.50, reported on the return. Obviously the respondent took the difference between the original cost and the sales price. Petitioner testified that during the time he held the property he made capital improvements to it. He had kept no records and his estimate of capital improvements was purely an estimate, but he described the nature of the improvements and gave his estimate as to the probable cost thereof [Tr. p. 15]. The same is true of the capital gain profits in 1942 [Tr. p. 45]. In 1946, for example, petitioner reported a short-term capital gain of \$1,500, whereas the respondent determined it was a long-term capital gain of \$1,002.02. The respondent decreased the amount of profit on that sale [Tr. p. 27]. In 1950, the respondent allowed additional miscellaneous deductions of \$1,728.11 which the taxpayer had not claimed. They were for contributions, interest, taxes, and legal fees [Tr. p. 30], and for the year 1951 the respondent allowed additional deductions for real and personal property taxes and legal fees which had not been claimed as deductions. Obviously the petitioner's failure to keep adequate records operated in many instances to his own disadvantage.

The amount of dividend income alleged to have been unreported during the years ranged from \$12.50 to \$50 per year. The interest income received during the years and alleged to have been unreported is set forth in the findings [Tr. p. 48]. The interest income was not paid directly to petitioner, but was credited to his real estate account in the Bank of America at Hawthorne, where the debtor made payments of principal and interest on the trust deeds. During the years 1947, 1948, and 1949, petitioner reported, in addition to his salary, "commis-



sions" in the amounts of \$2,000, \$3,000, and \$6,000, respectively. He testified that in reporting these amounts, he had intended to include all items of income other than his salary, including dividends and interest.

Fraud means actual intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing. The proof must be by fair preponderance of the evidence which is clear and convincing. (*Wickham v. Commissioner*, 65 F. 2d 527.)

The proof of fraud must be more than suggestive, and the Commissioner's burden is substantial, where the claim is first made long after the taxable year. The deficiency letters in these cases covering the years involved were sent to petitioner May 11, 1953. For all of the years involved, except the years 1945 and 1947, petitioner and his wife filed joint returns. Had he been attempting to minimize his tax, a substantial saving would have resulted had he and his wife filed separate community returns. Moreover, the fact that petitioner omitted legal deductions is some evidence that any alleged omissions of income was careless, rather than fraudulent.

### Conclusion.

For the foregoing reasons,

(1) The petitioner asks that the decision of the Tax Court ordering that there are deficiencies in income tax and penalties for the years involved should be reversed.

(2) In the alternative the petitioner asks that the decision of the Tax Court ordering that there are penalties for the years involved be reversed and the case remanded to the Tax Court for further proceedings on the issue of whether or not there are deficiencies.

Respectfully submitted,

GEORGE BOUCHARD,

*Counsel for Petitioners.*



No. 15,397

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**MILFORD R. BAUMGARDNER AND PEARL E.  
BAUMGARDNER, PETITIONERS**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**On Petition for Review of the Decisions of the  
Tax Court of the United States**

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**BRIEF FOR THE RESPONDENT**

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**CHARLES K. RICE,**  
*Assistant Attorney General.*

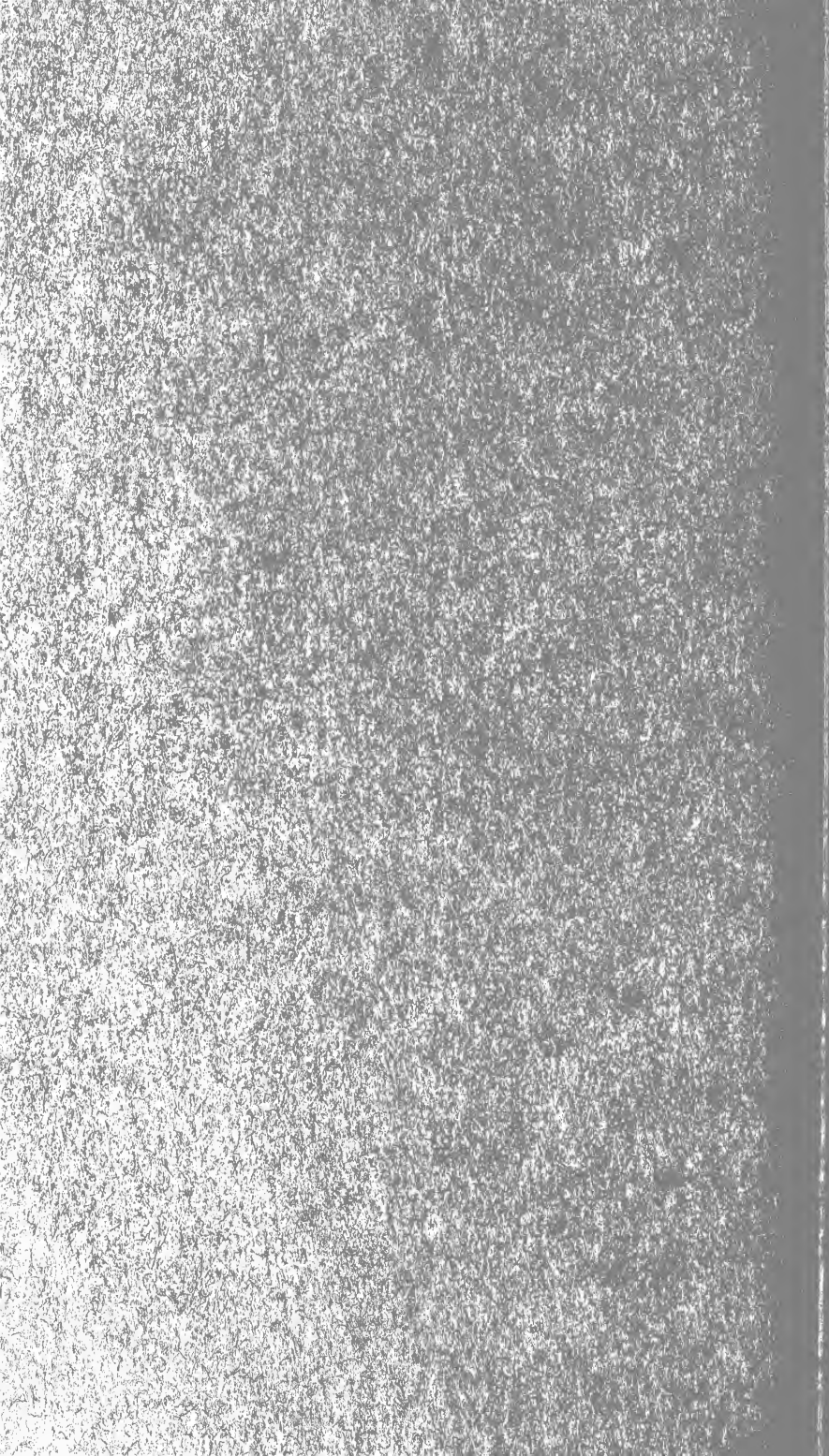
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**FILED**

**JUL - 5 1957**



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**In the United States Court of Appeals  
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No. 15,397

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*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**On Petition for Review of the Decisions of the  
Tax Court of the United States**

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The memorandum opinion of the Tax Court (R. 43-57) has not been officially reported.

**JURISDICTION**

This petition for review (R. 60-62) involves federal income taxes for the taxable years 1942, 1944, 1945, 1947, 1948, 1949, 1950 and 1951. On May 11, 1953, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiencies in the amounts of \$16,331.77 and penalties of \$10,-

599.39. (R. 12-16, 21-31.) Within ninety days thereafter and on July 31, 1953, the taxpayers filed petitions with the Tax Court for redetermination of these deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 6, 9, 16.) The decisions of the Tax Court were entered August 30, 1956. (R. 57-59.) The case is brought to this Court by a petition for review filed November 19, 1956. (R. 60-62.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

### QUESTIONS PRESENTED

1. Was the Tax Court upon the record justified in upholding the Commissioner's use of the net worth method in determining taxpayer's income for the years 1942—1951, inclusive, excepting the years 1944 and 1949 in which the deficiencies were determined upon specific omissions from the income returned?

2. Whether the Commissioner fully sustained his burden of proving that a part of the deficiency for each of the taxable years was due to fraud with intent to evade tax?

### STATUTES AND RULE INVOLVED

The pertinent statutes and rule involved are set forth in the Appendix, *infra*.

### STATEMENT

The findings of fact of the Tax Court were based partially upon stipulated facts and exhibits which were incorporated within the findings by reference. (R. 44-51.)



Taxpayer and his wife were residents of Hawthorne, California, for all taxable years in question. For the taxable years 1945 and 1947, taxpayer and his wife filed separate returns in accordance with the community property provisions of the State of California. For all other taxable years prior to 1948 taxpayer filed separate returns in which he claimed his wife as an exemption. For taxable years 1948 and the years thereafter joint returns were filed by taxpayer and his wife. All returns were filed with the Collector of Internal Revenue for the Sixth District of California.<sup>1</sup> (R. 44.)

Taxpayer lived in Oklahoma prior to moving to California. While in Oklahoma he held various jobs with a transfer company, grocery firm and as an operator for a motion picture theater. After his arrival in California he first worked as a restaurant dishwasher and also in a pool hall. Subsequently, he was employed by the Hawthorne Fire Department at a nominal salary. In 1927 he became a member of the Hawthorne police force and remained on the force except for a few short periods until his retirement in 1953. From 1937 until his retirement he was chief of police in Hawthorne, California. Taxpayer married in 1927 and his wife from that day on had no source of income except for the operation of a dress shop from March, 1948, to May, 1950. (R. 44-45.)

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<sup>1</sup> Taxpayer's wife is now a party in this suit only because joint returns were filed for some of the taxable years in question.

For the years 1925 to 1951, inclusive, taxpayer's earnings from the City of Hawthorne show the following (R. 45-46):

1925.....	\$ 45.00
1926.....	1,770.00
1927.....	1,800.00
1928.....	1,840.00
1929.....	1,920.00
1930.....	1,443.36
1931.....	2,068.06
1932.....	1,561.84
1933.....	0
1934.....	1,025.50
1935.....	1,570.00
1936.....	1,609.24
1937.....	1,768.02
1938.....	2,236.69
1939.....	2,220.00
1940.....	2,280.00
1941.....	2,284.20
1942.....	2,400.84
1943.....	2,775.09
1944.....	2,820.07
1945.....	3,066.99
1946.....	3,106.17
1947.....	3,911.83
1948.....	4,213.76
1949.....	4,507.21
1950.....	3,485.80
1951.....	6,061.70

For the years 1930 to 1939, inclusive, taxpayer and his wife filed no federal income tax returns. For 1940 and 1941 he filed returns showing no tax owing for those taxable periods. His wife filed no returns. In fact, prior to 1942 taxpayer and his wife had never paid an income tax. (R. 46.)

In 1937, 1938, 1939 and 1941 taxpayer had made

applications for loans. A study of the loan applications indicates the following (R. 46-47):

In 1937 taxpayer applied for a loan of \$200 with the Bank of America for purposes of paying off another obligation with the same bank having a balance of \$65.98 and also to pay for other expenses. The loan application contained information that at that time taxpayer owed \$250 to the Acme Loan Company, \$105 to the Inglewood Furniture Company and \$70 to the Federal Outfitting Company which were being paid off in monthly installments. Taxpayer listed no other income or source of income other than the police department of Hawthorne, California. The application specifically requested information as to all sorts of income. The bank rejected the loan. (R. 46-47.)

Taxpayer again applied for a loan with the Bank of California in April, 1938. The requested amount was \$200 for the purpose of taking a vacation trip to Oklahoma. Taxpayer stated on the loan application, which he signed, that he owed \$40 to the Marbro Department Store and \$40 to the Inglewood Furniture Company. Again taxpayer listed no other source of income other than the salary from the police department although the loan application specifically requested this information. In January, 1939, taxpayer negotiated a loan with the Bank of America of \$480.30 to refinance a used 1938 Chevrolet. The payments on the loan were to be \$32.02 per month. On the application taxpayer listed his salary of \$185 per month as his only source of income. (R. 47.)

In an application for a loan on property made in

1941 taxpayer and his wife stated their annual income to be \$2,400 per year. This application was signed by taxpayer and his wife. (R. 47.)

The records of the Bank of America where taxpayer carried accounts, upon an analysis prepared by a special agent, showed little activity with no large balances, deposits or withdrawals during the years 1940 to 1944, inclusive. (R. 47-48.)

The Commissioner determined the tax liability of taxpayer for all taxable years in question by the net worth method with the exception of the taxable years 1944 and 1949 in which the deficiency determination was based upon specific items of unreported income. The net worth statements were disputed by taxpayer in regard to three items. These items were the opening cash balance in each of the years in question, an investment in an establishment known as the Beacon Cafe as of December 31, 1946, and all the taxable years thereafter, and an investment in another establishment known as the Embassy Club as of December 31, 1951. The Commissioner determined that taxpayer had an opening cash on hand balance of \$100 in each of the taxable years in question. The Tax Court determined the taxpayer's opening cash balance as of December 30, 1940, was \$5,000 and remained the same through December 31, 1944. The court below further determined that the cash on hand balance for years ending December 31, 1945, through December 31, 1951, was \$3,000 for each individual year. The Tax Court also determined that the 1946 purchase of a interest in the Beacon Cafe made by taxpayer was for a third party who reimbursed tax-

payer. Accordingly, the court decided that taxpayer had no interest in the Beacon Cafe. The court found that in regard to the third disputed item taxpayer became owner of a 5% limited partnership interest in the Embassy Club, a poker club in Hawthorne, California, which had a capital balance in taxpayer's account of \$673.06 as of December 31, 1951. (R. 48, 50-51.)

Taxpayer kept no records of his real estate transactions, the receipts from the poker club, rental income, interest dividends or "commissions." The last named item was reported on his returns of 1947, 1948 and 1949 in the amounts of \$2,000, \$3,000 and \$6,000, respectively. (R. 48.) Taxpayer received interest income during the taxable years from his savings accounts, trust deeds and notes receivables. Most of the interest was collected by the bank and credited to the taxpayer's account. Taxpayer did not report the interest on his tax returns. (R. 48-49.) The interest received for the years below amounted to (R. 48)—

1944.....	\$ 115.03
1945.....	768.77
1946.....	1,093.39
1947.....	929.74
1948.....	904.09
1949.....	705.11
1950.....	626.18
1951.....	530.53

In 1949 taxpayer received rental income of \$1,550; \$1,250 was paid directly to the bank and credited to taxpayer's account and the remaining <sup>1300</sup> ~~\$3,000~~ was paid to taxpayer by check. None of this amount was

reported on taxpayer's 1949 tax return. (R. 49.) Taxpayer received dividend income in the years 1943 through 1948, inclusive, and also in 1951. The amounts ranged from \$12.50 to \$50. None of these amounts were reported on taxpayer's tax returns for the respective taxable years. (R. 49.) Taxpayer's distributable share in the poker club known as the Embassy Club, of which he was a limited partner, amounted to \$1,126.81 in 1951. He did not report this amount on his tax return for that year. (R. 49.) In 1944 taxpayer reported a gain on his income tax return of \$430 and \$780, respectively, representing the sale of two pieces of property. The actual gains in regard to the two pieces of property amounted to \$4,527.28 and \$2,136.26, respectively. Also, in 1945 taxpayer reported a gain of \$2,257 on a piece of property sold whereas the actual gain was \$5,359.05. (R. 49.) The Tax Court found that returns for each year in which there was a deficiency were false and fraudulent with intent to evade tax and that a part of the deficiency in each of such years was due to fraud with intent to evade tax. (R. 51.) The decision of the Tax Court pursuant to its prior findings of fact and opinion determined the following deficiencies and penalties regarding taxpayer for the following taxable years (R. 58-59):

Milford R. Baumgardner

Year	Tax Deficiency	Penalties	
		Sec. 293(b)	Sec. 294(d) (2)
1945.....	\$856.96	\$428.48	\$55.98
1947.....	316.16	158.08	19.35

# Milford R. Baumgardner and Pearl E. Baumgardner

Year	Tax Deficiency	Penalties		
		Sec.	Sec.	Sec.
		293 (b)	294 (d) (2)	294 (d) (1) (A)
1942.....	\$ 647.54	\$ 323.77	\$ ---	\$ ---
1944.....	886.93	443.47	---	---
1948.....	2,954.28	1,477.14	215.86	323.78
1949.....	326.88	163.44	78.22	---
1950.....	5,426.42	2,713.21	334.68	577.80
1951.....	1,434.62	717.31	104.62	174.36

## SUMMARY OF ARGUMENT

Taxpayer had been police chief of Hawthorne, California. The Commissioner of Internal Revenue determined deficiencies against taxpayer and his wife for all the taxable years of 1942 and 1944 through 1951, inclusive, and further determined that taxpayer and his wife had filed false and fraudulent returns for all the previously mentioned taxable years with an intent to evade tax. The special agent investigating this case had prepared a net worth analysis for determining income for the entire period under review. This analysis became the basis of the deficiency determination with the exception of the taxable years 1944 and 1949 in which the deficiencies were determined on the basis of specific omissions of taxable income. Taxpayer objected to the Commissioner's net worth analysis on three matters, namely, beginning cash on hand for all periods, ownership of an interest in the Beacon Cafe, and ownership of an interest in the Embassy Club. The Tax Court found that taxpayer had larger sums of opening cash on hand for all periods than the Commissioner deter-

mined, that he did not have any interest in the Beacon Cafe, but that he did have an interest in the Embassy Club. Further, the Tax Court found taxpayer's wife did not file false and fraudulent returns with intent to evade tax. These conclusions resulted in a decision that taxpayer's wife was not liable for any deficiencies and that the taxpayer's deficiencies were eliminated completely for one year and reduced for three of the remaining eight years.

Taxpayer contends that he had large hoards of cash on hand at the beginning of the net worth analysis which were hidden under his rug at certain times and later kept in his money belt. He says these sums were accumulated by his profits on investments in municipal bonds of Hawthorne, California. He attempted to corroborate his statements by obtaining the testimony of a former investment dealer he did business with. The investment dealer was unable to corroborate taxpayer's assertions except that he remembered taxpayer having purchased bonds although he did not remember the quantity. Taxpayer's contention of having accumulated large sums of undeposited cash is inconsistent with the amounts reported in his income tax returns prior to the beginning of the net worth period. Further, his transactions in obtaining small loans and the fact that he stated on his loan applications that he had no other source of income other than his salary are contrary to his claim of having huge sums of cash on hand. Even his own testimony contains numerous contradictions. The Commissioner made an extensive detailed investigation into the facts relating to taxpayer's claim. The



results of the examination failed to substantiate taxpayer's story.

Taxpayer's returns in comparison with the determination made by the Commissioner as adjusted by the Tax Court show a consistent pattern of under-reporting income in all the taxable years before this Court. In addition, taxpayer specifically failed to report his interest income in all years before this Court except one, failed to report his dividend income in five years on review, grossly understated his gain on sale of real estate in two years, failed to report his distributable share of a partnership interest in one year, omitted his rental income in one year, and did not report income from private investigations he made while a member of the police force in two years before this Court. In addition to proving fraud every one of these items is a likely source of income which taxpayer omitted to report if not an actual source of unreported income.

## ARGUMENT

### I

**Was the Tax Court Upon the Record Justified In Upholding the Commissioner's Use of the Net Worth Method In Determining Taxpayer's Income For the Years 1942-1951, Inclusive, Excepting the Years 1944 and 1949 In Which the Deficiencies Were Determined Upon Specific Omissions from the Income Returned?**

The Commissioner's determination of a deficiency is presumptively correct. *Helvering v. Nat. Grocery Co.*, 304 U.S. 282; *Helvering v. Taylor*, 293 U.S. 507; *Goe v. Commissioner*, 198 F. 2d 851 (C.A. 3d), certiorari denied, 344 U.S. 897; *Snell Isle, Inc. v.*

*Commissioner*, 90 F. 2d 481 (C.A. 5th), certiorari denied, 302 U.S. 734. The burden of overcoming this presumption is upon the taxpayer. The Tax Court concluded that taxpayer had met this burden only to the extent of establishing larger opening cash on hand balances than the figure determined by the Commissioner and, further, that taxpayer had no interest in one eating establishment the Commissioner had credited him with.

Taxpayer now appeals to this Court asserting that his opening cash balance was larger than the adjusted figure the Tax Court determined in that he had large hoards of undeposited cash on that date. (Br. 12-13.) It is a well accepted principle that the Tax Court's findings will not be disturbed upon review except when clearly erroneous; here, it is submitted, the record amply sustains them. The Tax Court based its conclusion instantly in part upon its appraisal of the credibility of witnesses, including taxpayer, who testified before it. Upon review due regard is given to this opportunity possessed by the trial court. *United States v. Gypsum Co.*, 333 U.S. 364, rehearing denied, 333 U.S. 869; *National Brass Works v. Commissioner*, 205 F.2d 104 (C.A. 9th); *Ferrando v. United States* (C.A. 9th), decided June 7, 1957; *Staudt v. Commissioner*, 216 F. 2d 610 (C.A. 4th); *Hague Estate v. Commissioner*, 132 F. 2d 775 (C.A. 2d), certiorari denied, 318 U.S. 787; Rule 52(a), Federal Rules of Civil Procedure; Section 7482(a) of the Internal Revenue Code of 1954 (Appendix, *infra*) (formerly Section 1141(a) of the 1939 Code).

In the deficiency determination thhe Commissioner credited the taxpayer with an opening cash on hand balance of \$100 as of the beginning of each taxable period. The Tax Court adjusted this determination in favor of the taxpayer by deciding that taxpayer's cash on hand balance was \$5,000 for each of the years ended December 31, 1940, through December 31, 1944, inclusive, and \$3,000 for each of the years ended December 31, 1945, through December 31, 1951. (R. 50.) Taxpayer urges that his cash on hand figures for each of the respective years in question were larger that that attributed to him by the Tax Court. A review of the evidence contained in the record and exhibits introduced in the Tax Court proceedings indicates that the Tax Court was, if anything, very liberal in making its determination as to taxpayer's cash on hand balances for the periods in contention.

Taxpayer's wages from the City of Hawthorne in the period 1925 through 1941, inclusive, show very clearly that they were insufficient to allow any substantial accumulations of savings prior to January 1, 1942, in that his maximum salary was only \$2,284.20 in 1941. (Ex. 15-0.) Taxpayer had stated in applying for small loans in 1937, 1938 and 1939 that he had no other source of income other than his salary from the City of Hawthorne. (Exs. II, JJ and KK.) The tax returns of the taxpayer for prior years further corroborate the fact that he had no large accumulations of cash on hand at the beginning of the taxable period under review. Taxpayer had not paid any tax prior to taxable year 1942

and had not even filed a return prior to the taxable year 1940. In addition, the fact that taxpayer had to borrow small sums in 1937, 1938, 1939 and 1941 is entirely inconsistent with his statement that he had large amounts of accumulated cash on hand.

Nevertheless the taxpayer states that he brought a few thousand dollars to California when he arrived from Oklahoma and that he supplemented this amount with profits made on investments in municipal bonds of the City of Hawthorne. (R. 221-224.) He claims that these alleged sums of money were not banked but instead hidden "under the rug" for some years and then kept on his person by means of a money belt for other years. (R. 261, 276.) However, taxpayer's story is replete with inconsistencies. In regard to the amount of cash on hand at the pertinent opening date of the net worth analysis, taxpayer stated on direct examination that he could not tell how much cash he had, on cross-examination he said it was \$6,000, \$8,000 or \$10,000, and he told the special agent of the Internal Revenue Service that he had \$8,000 to \$10,000 under a rug. (R. 169, 262-263, 282.) Taxpayer later stated that he kept this alleged hoard of money in a money belt on the opening date of the net worth analysis. (R. 261.) The special agent testified that taxpayer's wife stated that she did not think her husband was telling the truth about the cash and the largest amount of cash he had on hand at any one time was \$1,000. (R. 174, 193.) She later disputed making this statement at the trial. (R. 200-201.) In fact, there was even an inconsistency in taxpayer's testimony in the trial

below and in his prior statement in a criminal trial as to what period he purchased the municipal bonds. (R. 268-269.)

On the other hand, the special agent who investigated the facts contained in the case at bar made a thorough examination of the taxpayer's claim of cash on hand as of the opening net worth date in conformity with the Supreme Court's pronouncement in criminal net worth cases. *Holland v. United States*, 348 U.S. 121, 135. He stated that he examined the following and was unable to find any evidence of any large amounts of cash on hand as of January 1, 1942, or of any other assets or liabilities other than those listed in the net worth analysis he prepared (R. 181-182):

1. Bank accounts. (R. 178-179, Ex. NN.)
2. Bank loan records. (R. 179.)
3. Records of income tax returns filed. (R. 180; Ex. 12-L.)
4. Bank escrow files. (R. 180.)
5. Payroll records of the City of Hawthorne. (R. 181.)
6. City of Hawthorne bond records. (R. 181.)
7. Record of tax lien sales. (R. 181.)
8. Grantor-grantee indices for Los Angeles County. (R. 181.)
9. Trust deeds and mortgages thereon. (R. 179, 181.)

The sole evidence offered by taxpayer with the exception of his self-serving statement was the testimony of a witness who had stated that he sold taxpayer some bonds in prior years. The testimony of

this witness proves very little if anything as to the sum of money taxpayer had invested in municipal bonds prior to the opening day of the net worth statement, to say nothing of the amount realized upon their disposition. The witness stated that he had no idea as to the specific amount of bonds purchased by the taxpayer. He said though that he thought that it "may be some place between \$15,000 to \$35,000." He explained that when making reference to this figure he was speaking of the par value of the bonds for at that time the bonds were selling in the range of 10¢ to 14¢ on the dollar. He also stated that he did not know whether these bonds were paid at par or whether they were paid at a discount. (R. 256-257.) All in all it cannot be said that this witness introduced any specific evidence whatsoever relating to the amount of cash that taxpayer had as of the opening net worth date. The Tax Court made its own determination as to the opening cash on hand balances. Weighing of all the evidence concerning the disputed amount and the translating of it into an actual monetary figure is a proper judicial function well-recognized by the courts. *Bodoglau v. Commissioner*, 230 F. 2d 336 (C.A. 7th); *Commissioner v. Thompson*, 222 F. 2d 893 (C.A. 3d); *Cohan v. Commissioner*, 39 F. 2d 540 (C.A. 2d). It can hardly be said that the judge below made an arbitrary determination. Upon weighing the evidence and considering all elements he made his determination as to the proper amount of cash on hand for each respective period. The court stated that it did not believe taxpayer had

hidden hoards of money although it did accept the fact that taxpayer invested in bonds. (R. 53-54.) Its determination was grounded in the evidence and was anything but clearly erroneous or arbitrary.

Taxpayer has failed to introduce any evidence whatsoever with the exception of his own self-serving statement as to the amount of the alleged cash hoards that he claimed he had on the opening net worth date. His testimony is vague, bears numerous inconsistencies, and contains implausible statements. The Tax Court upon judging his demeanor as a witness stated it did not believe the taxpayer's claim that he had large cash hoards hidden under rugs and in money belts. The special agent made an intensive and exhaustive investigation into the many records and sources that could substantiate taxpayer's claim. He found nothing. This case would meet the requirements in a criminal case for the successful negation of a taxpayer's claim of hoards of hidden cash on hand at the opening date of the net worth analysis as stated by the Supreme Court. *Holland v. United States*, *supra*; *Friedberg v. United States*, 348 U.S. 142; *Smith v. United States*, 348 U.S. 147; *United States v. Calderon*, 348 U.S. 160. Certainly the facts of this case are more than sufficient to disclaim taxpayer's contention in the instant civil suit.

In the trial below the taxpayer questioned the net worth analysis as to two items in addition to the opening cash on hand balance. These items were two entertainment establishments included as assets of the taxpayer by the Commissioner. (R. 52.) The

Tax Court found that taxpayer had no interest in one establishment but upheld the Commissioner's determination as to the other. (R. 54-55.) The Commissioner accepts this decision in that the facts contained in the record afford a basis for this conclusion. It can be inferred from taxpayer's brief that he also accepts the Tax Court's decision on this matter. (Br. 17.) However, if this be an erroneous inference on the part of the Commissioner, the record containing a letter from the Embassy Club's certified public accountant to the taxpayer informing the latter of his partnership income from the club, in addition to an amendment to the articles of the partnership bearing taxpayer's signature and filed February 6, 1951, certainly substantiate the fact that taxpayer had an interest in a partnership interest in the Embassy Club. (R. 70, Exs. 4-D, R.)

## II

*Whether* The Commissioner Fully Sustained His Burden of Proving that a Part of the Deficiency for Each of the Taxable Years Was Due To Fraud With Intent To Evade Tax?

The burden of proof of fraud rests upon the Commissioner. Section 7454(a) of the Internal Revenue Code of 1954 (Appendix, *infra*). In proving fraudulent intent the Commissioner has to show only that some part of each deficiency was due to fraud with intent to evade tax. Section 293(b) of the Internal Revenue Code of 1939 (Appendix, *infra*). As in the case of a factual determination as to the amount of the deficiency, it is a well accepted principle that



a Court of Appeals does not disturb the Tax Court's factual findings as to fraud if they are supported by clear and convincing evidence. *Helvering v. Kehoe*, 309 U.S. 277; *Rose v. Commissioner*, 188 F. 2d 355 (C.A. 9th), certiorari denied, 342 U.S. 850, rehearing denied, 342 U.S. 889; *Goe v. Commissioner*, 198 F. 2d 851 (C.A. 3d), certiorari denied, 344 U.S. 897; *Halle v. Commissioner*, 175 F. 2d 500 (C.A. 2d), certiorari denied, 338 U.S. 949; *Greenfeld v. Commissioner*, 165 F. 2d 318 (C.A. 4th). It is respectfully submitted that the Tax Court's finding of fraud in this case is amply supported by clear and convincing evidence and should be sustained. In the deficiency notice issued by the Commissioner it was determined that the taxpayer and his wife had fraudulently understated income in their joint tax returns and separate returns for each of the taxable years named in the deficiency notice. (R. 12, 21-22.) In the proceeding in the Tax Court it was found that the taxpayer did have larger amounts of undeposited cash on hand at the pertinent periods in relation to the net worth analysis and also that he did not have an interest in a restaurant establishment that the Commissioner had included as one of his assets. The Tax Court also found that the wife had not filed fraudulent returns for the years in which she filed separate income tax returns—1945 and 1947. This determination eliminated the taxpayer's deficiency completely for the taxable year 1946 and reduced the deficiencies for three of the remaining eight taxable years. However, with all of these adjustments in favor of the taxpayer the evidence still shows that

taxpayer consistently understated his reported income.

A comparison of the income reported by taxpayer on his tax returns and the income determined by the Commissioner as adjusted by the Tax Court's findings under Tax Court Rule 50 (Appendix, *infra*) computation for the taxable years under review is as follows (R. 14-16, 24-31):<sup>2</sup>

	Income reported	Income determined under Rule 50 of the Tax Court
1942	\$ 2,630.76	\$ 5,821.02
1944	3,505.07	7,179.08
1945	2,372.75	6,037.82
1947	2,955.91	4,679.19
1948	7,721.02	19,952.17
1949	10,436.47	11,865.13
1950	4,996.29	27,062.23
1951	6,132.95	12,071.07

It is obvious that there is a shocking disparity between the income reported by taxpayer in his tax returns and that determined by the Tax Court. A persistent failure to report large amounts of income over an extended period without more is strong evidence of fraudulent intent. *Holland v. United States*, 348 U.S. 121; *Smith v. United States*, 348 U.S. 147; *Lipsitz v. Commissioner*, 220 F. 2d 871 (C.A. 4th); *Halle v. Commissioner*, *supra*; *Rogers v. Commissioner*, 111 F. 2d 987 (C.A. 6th). Where, as

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<sup>2</sup> These figures are based on taxpayer's reported net income for 1942, 1948, 1949 and 1951, and on his reported adjusted gross income for years 1944, 1945, 1947 and 1950. The income determined under Rule 50 is based on either net income or adjusted gross income for the same respective years.

here, the pattern of unrecorded and unreported income is accompanied by many of the common badges of fraud, the requisite intent to evade tax is unmistakably clear. See *Goe v. Commissioner*, *supra*; *Lipsitz v. Commissioner*, *supra*; *Heyman v. Commissioner*, 176 F. 2d 389 (C.A. 2d), certiorari denied, 338 U.S. 904; *Cohen v. Commissioner*, 176 F. 2d 394 (C.A. 10th); *Bodoglau v. Commissioner*, 230 F. 2d 336 (C.A. 7th); *Kenney v. Commissioner*, 111 F. 2d 374 (C.A. 5th).

In the instant case the facts indicate that there was more than just the usual inferences of fraud; in this case we have numerous instances where specific items of income were not reported by taxpayer on his income tax return for the taxable years before this Court. The special agent investigating this case questioned taxpayer as to whether he reported all of his income on his tax returns. Taxpayer stated that he did. (R. 159.) However, from a review of the facts it can readily be seen that taxpayer was not being truthful in making this statement.

Taxpayer received interest income in every taxable year on review with the exception of 1942. (Stip. par. 4; Ex. 3-C.) The taxpayer was asked by his own accountant whether he had any other income that was not reported on his tax return. Taxpayer replied that he did not have any other income. (R. 83-85.) But as the income tax returns show for the respective years before this Court, taxpayer never reported his interest income on his returns. (Exs. 17-Q, S, 6-F, 8-H, 9-I, 10-J, 11-K.) Taxpayer attempts to explain this by saying that his interest

expense exceeded his interest income and consequently he saw no need to report the latter as such. (R. 242, 266.) However, this explanation is inconsistent with taxpayer's prior statements and actions. (R. 231, 237.) His returns indicate that they were prepared with detail and expenses and income were purportedly set out as such. Also, in one year interest expense was shown on the return although the interest income earned that year was not. (Ex. 11-K.) Furthermore, taxpayer claims that he had interest expense in one year when he had no liabilities upon which there could be any interest owed. (R. 270.) It must also be noted that taxpayer initially stated on cross-examination that he had reported his interest income. However, he soon contradicted himself when presented with an income tax return and asked to indicate where the interest income was reported. (R. 265-266.) Much of the same can be said for the dividend income earned by taxpayer. In this instance taxpayer earned dividends in the years 1943 through 1948, inclusive, and 1951. (Stip. par. 6.) He was also asked by his accountant when his returns were being prepared whether he had any income other than that he had reported. Here also again he said he had none. (R. 83.) However, the returns for these respective years failed to show any dividend income reported by taxpayer. (Ex. 17-Q, S, 6-F, 8-H, 11-K.)

Taxpayer had a partnership interest in the Embassy Club in 1951. (Stip. par. 7.) He was specifically notified of his share of income earned that year in a letter sent to him by the club's certified

public accountant. (R. 70.) The letter informed him that his distributive share of the income from the club for the year 1951 was an amount in excess of \$1,100. (Exs. R, 13-N, 14-M.) As the 1951 return indicates, taxpayer failed to report this amount although he was certainly put on notice that he had earned the sum in question. (Ex. 11-K.)

As the stipulation between the parties indicates, taxpayer earned rentals in 1949 of \$1,550. (Stip. par. 5.) The 1949 income tax return showed that taxpayer did not report his rental income for that year. (Ex. 9-I.) Clearly taxpayer knew that rental incomes had to be reported since he had reported these sums in prior and subsequent years. (Ex. 16-P, 17-Q, 10-J, 11-K.)

The capital gains realized on sale of real estate by taxpayer in the years 1944 and 1945 present shocking omissions of gains reported. In 1944 taxpayer sold two items of real estate. The amount of gain realized on the sale of these properties was \$8,207.96. (Stip. pars. 9, 10.) The amount reported by taxpayer on his 1944 federal income tax return was \$1,210. (Ex. 17-Q.) Again, in 1945 taxpayer sold property upon which he realized a gain of \$5,359.05. (Stip. par. 11.) However, the gain reported was only \$2,257. (Ex. S.) There is no justification for these actions. Taxpayer attempts to explain it away by saying that he made numerous repairs to his properties that offset any gain he did not report. (R. 232-233.) However, taxpayer's returns indicate that he had taken repairs as a deduction on his returns in the years when they were incurred.

Taxpayer reported certain income in an account title "commissions" in the taxable years 1947, 1948 and 1949. (Exs. 6-F, 8-H and 9-I.) From the record it is rather difficult to determine just what was reported in this account title. (R. 81-82, 166, 236.) Purportedly they were amounts received by taxpayer for performing private investigations while he was a member of the Hawthorne police force. (R. 236, 243, 266.) Taxpayer was very vague in explaining just what "commissions" were to the special agent investigating the facts in the case at bar and also to the Tax Court.<sup>3</sup> And, further, he would not tell who the people were who paid him these "commissions." (R. 157-158, 166, 230.) It is interesting to note that after contradicting himself taxpayer admitted that he also received these type of payments in the taxable years 1950 and 1951. (Ex. RR; R. 266, 273-274.) However, the returns for those respective years fail to show these amounts as being reported. (Ex. 10-J, 11-K.)

In his brief before this Court taxpayer has made the further argument that the Commissioner showed no likely source of income from which it could be stated that taxpayer was receiving unreported taxable income. (Br. 7-15.) Certainly this argument is without substance for the taxable years 1944 and 1949 in that the deficiencies for those years were determined on the basis of specific omissions of items

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<sup>3</sup> In the witness' own words (R. 236) they were: "Any moneys I might receive during the year for interest, for gratuities or anything that might come along, other than my salary."

of income rather than use of the net worth analysis. For those years the unreported income did not come from a "likely source"—it came from an actual source. Likewise, for all of the other years, taxable years in which the Commissioner relied upon the net worth analysis, it can easily be seen from the facts presented that the Commissioner introduced direct evidence of many likely sources of unreported income in regard to the taxpayer. It was shown that taxpayer was a partner in a poker club, the Embassy Club, from which he received income in 1951 which was not reported on his income tax return for that year. (R. 70; Ex. 4-D; Stip. pars. 7-8.) There was evidence that the income tax returns for the years 1944 to 1951, inclusive, show that taxpayer failed to report any interest income earned in those years on the returns for the respective years. (Stip. par. 4; Exs. 3-C, 17-Q, S, 6-F, 8-H, 9-I, 10-J, 11-K.) Also, taxpayer received dividend income during the years 1943 through 1948, inclusive, and 1951, which he failed to report on his income tax returns for those years. (Stip. par. 6; Exs. 17-Q, S, 6-F, 8-H, 11-K.) There were three specific instances in which taxpayer grossly understated the gain on sale of property in the years 1944 and 1955. (Stip. pars. 9, 10, 11; Exs. 17-Q and S.) Finally, taxpayer even indicates a likely source of unreported income himself in his testimony regarding the "commissions" received from private investigations. Regarding this item taxpayer would not divulge any information to the special agent regarding who had paid him the sums he had reported, and there was strong evidence

that by his own admission he received sums in certain years which were not reported. (R. 157-158, 243; Ex. RR, 10-J, 11-K.)<sup>4</sup>

It almost appears frivolous to assert that the Commissioner failed to indicate any likely source of unreported income received by taxpayer. As the record and exhibits indicate taxpayer had numerous likely sources of income from which he could have received the income he failed to report in his income tax return. *Davis v. Commissioner*, 239 F. 2d 187 (C.A. 7th).<sup>5</sup>

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<sup>4</sup> The Tax Court stated that in reaching its conclusion that taxpayer had fraudulently prepared his income tax returns it was not influenced by the testimony of the two witnesses who asserted that they paid protection money which may have reached taxpayer in his position as police chief. (R. 56, 125-127, 136; Ex. 00.)

<sup>5</sup> This brief has not discussed the penalties under Section 294(d)(1)(A) or (d)(2) of the 1939 Code (Appendix, *infra*) in that taxpayer has apparently not questioned them in his brief in this Court or the court below. The Tax Court said (R. 56):

No evidence was adduced with respect to the additions to tax pursuant to Sections 294(d)(1)(A) and 294(d)(2) and the Commissioner's determination in this respect is sustained.



## CONCLUSION

For the foregoing reasons, we submit that the decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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JULY, 1957.

## APPENDIX

## Internal Revenue Code of 1939:

## SEC. 276. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

\* \* \* \*

(26 U.S.C. 1952 ed., Sec. 276.)

## SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

\* \* \* \*

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d) (2).

(26 U.S.C. 1952 ed., Sec. 293.)

## SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

\* \* \* \*

(d) [As added by Sec. 118(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, and amended by Secs. 6(b) (8) and 13(b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sec. 2 of the Act of January 2, 1951, c. 1195, 64 Stat. 1136, and Sec. 103(b) of the Revenue Act of 1951, c. 521, 65 Stat. 452] *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—

In the case of a failure to make and file a declaration of estimated tax with-

in the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purpose of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

\* \* \* \*

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35, in the case of individuals other than farmers exercising an election under section 60(a), or 66  $\frac{2}{3}$  per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under

regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under sections 60 (a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and 66  $\frac{2}{3}$  per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuals imposed by the Revenue Act of 1951.  
(26 U.S.C. 1952 ed., Sec. 294.)

## Internal Revenue Code of 1954:

## SEC. 7454. BURDEN OF PROOF IN FRAUD AND TRANSFEREE CASES.

(a) *Fraud*.—In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary or his delegate.

\* \* \* \*

(26 U.S.C. 1952 ed., Supp. II, Sec. 7454.)

## SEC. 7482. COURTS OF REVIEW.

(a) *Jurisdiction*.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

\* \* \* \*

(26 U.S.C. 1952 ed., Supp. II, Sec. 7482.)

Rules of Practice Before the Tax Court of the United States (Rev. to August 15, 1955):

## RULE 50. COMPUTATIONS BY PARTIES FOR ENTRY OF DECISION.

(a) *Agreed computations*.—Where the Court has promulgated or entered its opinion determining the issues in a proceeding, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount

of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and two copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

\* \* \* \*

No. 15399

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

EDWARD POOL and LOTTIE POOL, EDWARD POOL, LOTTIE  
POOL, WILLIAM K. MURPHY, EDNA MURPHY, WIL-  
LIAM K. MURPHY and EDNA MURPHY,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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On Petitions for Review of the Decisions of the Tax Court  
of the United States.

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## BRIEF FOR THE PETITIONERS.

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PAUL P. O'BRIEN, CLERK





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No. 15399

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

EDWARD POOL and LOTTIE POOL, EDWARD POOL, LOTTIE  
POOL, WILLIAM K. MURPHY, EDNA MURPHY, WIL-  
LIAM K. MURPHY and EDNA MURPHY,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

On Petitions for Review of the Decisions of the Tax Court  
of the United States.

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## BRIEF FOR THE PETITIONERS.

---

### Opinion Below.

The only previous opinion in this case is the memo-  
randum opinion of The Tax Court of the United States,  
which is unreported. [R. 29-88.]

### Jurisdiction.

These Petitions for Review [R. 95-97] involve federal  
income taxes for the calendar years 1946, 1947, and 1948.  
[R. 89-94.] On May 17, 1951, the Commissioner of  
Internal Revenue mailed to the taxpayers a determination  
of deficiencies in income tax for each of the six cases

here consolidated.<sup>1</sup> Representative of these notices of deficiencies is the one mailed to Edward and Lottie Pool for the year 1948. [R. 8-9.] Within 90 days thereafter and on August 8, 1951, each of the taxpayers filed a petition with The Tax Court of the United States for redetermination of the asserted deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. [R. 5-8.] The decisions of The Tax Court of the United States sustaining the deficiencies in part were entered August 21, 1956. [R. 89-94.] These cases were brought to this Court by Petitions for Review filed November 5, 1956 [R. 95-97] pursuant to the provisions of Section 7482 and Section 7483 of the Internal Revenue Code of 1954.

### Question Presented.

The taxpayers sold duplexes during the taxable years. These buildings had been leased to tenants from the time acquired by taxpayers until they were sold. The question is whether under the circumstances of this case the duplexes which concededly were "real property used in the trade or business" of the taxpayers are nevertheless to be

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<sup>1</sup>An order of this Court filed January 10, 1957 [R. 533-535] consolidated the six cases for purposes of "briefing, hearing and decision under the title of Edward Pool and Lottie Pool, *et al.*, v. Commissioner of Internal Revenue." That order also provided that the documents included in the transcripts of record on review in the five cases bearing Tax Court Nos. 36109-36113 inclusive not be printed, but that only the full and complete transcript in the case of Edward and Lottie Pool, Docket No. 36108, be printed, omitting, however, exhibits. The order provided, however, that the exhibits may be considered in the decision of the case as fully as if they had been printed. [R. 534.]



denied the capital gain treatment under Section 117(j) of the Internal Revenue Code of 1939, because as The Tax Court found the property was also held by the taxpayers “primarily for sale to customers in the ordinary course of . . . [their] trade or business” within the meaning of Section 117(j).

### **Statute Involved.**

Internal Revenue Code of 1939:

“Section 117(j) [as added by Section 151(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Section 127(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.

“(1) Definition of property used in the trade or business. For the purposes of this subsection, the term ‘property used in the trade or business’ means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. . . .

“(2) General Rule. If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in

part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. . . .” (26 U. S. C. (1946 Ed.), Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

“Section 117(j) provides that the recognized gains and losses

“(a) from the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is

“(1) of a character subject to the allowance for depreciation provided in section 23(1), or

“(2) real property,

provided that such property is not of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade of business, . . . shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. . . .”

### Statement.

The findings of fact and opinion of The Tax Court dealt with additional issues from which no appeals were taken. Accordingly, a considerable portion of The Tax Court's findings are no longer relevant to any issue remaining in the case. As for those findings of The Tax Court which relate to the question on appeal we have no quarrel with the exception of the conclusion that the duplexes were held for sale to customers in the ordinary course of taxpayers' business. This we show in the argument is actually a conclusion of law but in any event "clearly erroneous." Nevertheless the primary findings as a whole are in part misleading in that they detail many facts which have little relevance and omit many facts that are both relevant and material. Accordingly, we deem it appropriate to present properly the facts to this Court to summarize the Tax Court's findings of fact [R. 33-70], but supplement those findings with material facts which have been omitted where required by either the stipulation of facts [R. 17-29], or uncontradicted and unimpeached testimony which without exception is supported by either documentary evidence or cumulative testimony of disinterested witnesses. These facts may be summarized as follows:

1. Edward Pool and Lottie Pool are husband and wife, as are William K. Murphy and Edna Murphy. Each couple filed its federal income tax returns on the cash basis and by calendar years with the Collector of Internal Revenue for the Sixth District of California. For the years 1946 and 1947 each taxpayer filed separate returns. For 1948, each couple filed a joint return. [R. 33.]

2. Artcraft Builders, Inc. (hereinafter referred to as Artcraft) is a California corporation. It was organized

on March 10, 1941, to engage in residential building, both under contract for others, and for sale to the public generally. Its stockholders were Mr. and Mrs. R. T. Cooke, Mr. and Mrs. J. S. A. Smith, Edward Pool and William K. Murphy. [R. 33-34.]

3. The taxpayers purchased all of the stock of Mr. and Mrs. Cooke and Mr. and Mrs. Smith on or about June 1, 1943, as a result of disagreement over the future policy of Artcraft which had arisen no later than August 18, 1942, and continued until the purchase of the Cooke and Smith stock. On August 18, 1942, Pool had proposed that Artcraft build income units. This proposal was disapproved by Artcraft's Board of Directors. Murphy and Pool desired to have Artcraft build apartments and duplexes for sale to the stockholders, who, under their proposal, would retain them for the purpose of obtaining income by renting them. Cooke and Smith, however, wanted Artcraft to continue with its established mode of business. As a result of the taxpayers' purchase of the Cooke and Smith stock, the way had been paved to carry out Pool's original proposal, which had always had the support of Murphy. [R. 36, 37, 146-147, 157-159, 168, 437-438, 507; Par. 7 Stip., R. 19, Ex. 21.]

4. Accordingly, Artcraft entered into a contract with the taxpayers on September 16, 1943, pursuant to which Artcraft agreed to build 22 apartments and 70 duplexes on Tracts 11674 and 11451 respectively, for taxpayers. The 22 apartments and 70 duplexes were built by Artcraft and on March 31, 1944, were deeded to taxpayers as tenants in common pursuant to the contract of September 16, 1943. On February 26, 1945, a similar agreement was made between Artcraft and taxpayers pursuant to which Artcraft was to build 100 duplexes for taxpayers

on Tract 13163. Artcraft was paid \$35,333.21 for building the 100 duplexes. These duplexes were deeded to taxpayers as tenants in common on March 21, 1946.<sup>2</sup> [R. 44-46; Exs. C-3, E-5; Stip. par. 12, 20; R. 20-21, 25-26, 52.]

5. The dwelling units constituting the 22 apartments and 70 duplexes were rented as construction was completed. The first unit to be rented was in one of the 22 apartment buildings on the day before Thanksgiving in 1943. The rental terms were in keeping with the requirements of the priorities application and General Order Numbers 60-2 and 60-3 of the National Housing Administration. The initial leases were all written and were for a period of one year, although some of them thereafter may have been leased for longer periods. [R. 44.]

6. The 100 duplexes in Tract 13163 were leased as they were completed, all of the leases being for a period of one year. The dates of completion were June, July and August of 1945. [R. 54.]

7. At a meeting of the Board of Directors of Artcraft on June 14, 1944, an oral agreement between taxpayers and Artcraft was ratified pursuant to which Artcraft built a market building for taxpayers on land owned by

---

<sup>2</sup>As the Tax Court found [footnote 5, R. 52] there was "testimony to the effect that a similar deed covering the said properties was delivered to the four individuals at or about the time of the said [February 1, 1946] Directors' meeting." In view of the entire record this is less than a complete finding, but since it appears to be immaterial to any present issue there is no reason to detail the evidence that establishes the existence of the earlier deed. This is so because even if the date of the second deed, March 21, 1946, is used the six months' holding period required by Section 117(j)(2) of the I. R. C. of 1939 is satisfied since as noted in the Statement, *infra*, the date of the deed for the first of the 100 duplexes sold was September 23, 1956. [R. 61.]

taxpayers for a fee measured by the cost of the building plus 10 per cent. At the time of the trial of this case the market was still owned by taxpayers and at all times since completion had been rented. [Stip. par. 19, R. 25; R. 47; Ex. I-9.]

8. Murphy and Pool wanted to invest in rental real estate, and did invest in the 22 apartments, 70 duplexes, 100 duplexes and the market building which it was their intention to hold for a long period of time because of the highly speculative nature of the building business which they had been engaged in. They were cognizant of the obligations to their dependents and the hazardous nature of the business of building houses on contract and for speculation. Friends and business acquaintances whose opinions they respected also advised that they invest in rental property. They desired a steady income that they could rely on as they grew older and, in addition, they had been asked by officials of Douglas Aircraft Corporation and the Federal Housing Administration to build houses to help to take care of the influx of workers to Southern California. [R. 153, 177-178, 507-508, 509.]

9. The Federal Housing Administration Subdivision Information Form relating to the 22 apartment buildings, which consisted of 68 rental units, described the apartments as being built for rent and not for sale, as did the similar form for the 70 duplexes. Question 1(m) of Exhibit 19 which reads "Number of homes to be built immediately to order" was answered "68 rental units." The second part of that question, "For sale" was filled in "no." Question 1(o) of the same Exhibit "Price range existing homes" was left unanswered, and instead there was inserted the phrase, "Rental range from \$48.00 to \$53.00." Question 1(p) entitled "Outline selling and

improvement program contemplated" was answered "all rentals." This Exhibit indicates that it was submitted to the Federal Housing Administration on July 21, 1943.

10. Similarly, Federal Housing Administration Subdivision Information Form relating to the 70 duplexes which also bears the date of July 21, 1943, answers question 1(m) "Number of homes to be built immediately to order," "140 Rental units," and the subquestion "For sale" was answered "no." Question 1(o) relating to the price range of proposed homes was answered, "Rental—\$50.50 per month." Question 1(p) which requests "Outline selling and improvement program contemplated," was answered "none." [Ex. 20.] Both forms contain the following printed statement immediately above the space for signature as follows: "The undersigned represent that to the best of their knowledge and belief the statements, information, and conditions contained herein are correct, and the required exhibits are attached hereto in duplicate."

11. The War Production Board priority application for the 100 duplexes did not request a sales price, but included only a rental schedule. Exhibit M-13, which was a joint exhibit attached to the stipulation of facts [R. 27] answers question 2(a) at the top of page 3, column 8, "Shelter Rent," "\$42.50 per unit"; and column 9, "Charge for Tenant Service, \$7.70"; and "Total Rent" (column 11) "\$50.25." The final column (12) "Range of Sales Prices" contains no figure. At the bottom of the page immediately preceding this schedule, under the heading "Rental and Sale Schedule" there is the statement "If dwelling units are to be sold under the provisions of N. H. A. General Order No. 60-3, also indicate in column (a) (12) the proposed sales prices including the sales prices for units which may be sold under the lease-option

provision of N. H. A. General Order Number 60-2.” Finally, under the signature of W. K. Murphy on page 3 of the form, which purports to be signed as of January 4, 1945, is the statement, “Section 35(a) of the United States Criminal Code, 18 U. S. C. Sec. 80, makes it a criminal offense to make a willfully false statement or representation to any department or agency of the United States as to any matter within its jurisdiction.”

12. On or about April 1, 1944, the four taxpayers formed a joint venture or partnership known as “Edward Pool and Associates.” Thereafter the partnership or joint venture kept its books on an accrual and fiscal year basis ending January 31 of each year. [Stip. par. 13, R. 21; R. 46-47.]

13. Artcraft performed the services of rental agent for the partnership for the period the partnership owned the 22 apartments, the 70 duplexes, the 100 duplexes and the market building. As rental agent Artcraft entered into leases, collected rent, kept books, paid bills and generally managed the property. For these services the partnership paid Artcraft the following amounts: 1944, \$7,745; 1945, \$9,357; 1946, \$23,614; 1947, \$15,500; 1948, \$12,000. [Stip. par. 14, R. 21-22; R. 55-56.]

14. The partnership income tax return of Edward Pool and Associates for the taxable years stated that the business of the partnership was “Real Estate Rentals.” [Exs. U, V, and W.]

15. When Artcraft was building houses for sale, it always built single family units because they were easier to sell. Speculative builders in Southern California at that time did not generally build multiple buildings for resale. There was no market for multiple dwellings at



the time. If the partners had wanted to build for sale they would have caused single units to be built. [R. 154-157, 277, 358, 378, 394, 507-508, 521.]

16. Conversely, multiple dwellings were a more superior form of income investment than single family units. The cost of lots, streets, sidewalks, sewers, water, maintenance, etc. is greater for single family units than for multiple dwellings, compared to the amount of rental income obtainable. These costs for four single family houses would approximate four times the cost for one apartment with four rental units. [R. 154-155, 251, 525.]

17. It was possible to secure War Production Board priorities to build single family units, and the Board had granted such priorities in the same general area at the time Artcraft was building the 22 apartments and the 70 duplexes. [R. 155-157, 247-248.]

18. The 22 apartment buildings, the 70 duplexes and the 100 duplexes were of better quality, both in workmanship and materials used, than the houses heretofore built and sold by Artcraft. [R. 53.] They were, moreover, of better quality than was customary in houses being built for resale generally. Thomas H. Block, a plaster contractor for approximately 25 years, testified he had approximately 200 employees at the time the duplexes and apartments were being built, and that he had bid on practically all the tracts being built in Los Angeles County during this period. He was asked to bid on the duplexes and apartments, and he did not do so solely because the stringent specifications required more man hours than he had men available to do the work. They were more stringent in that they required expendable metal lath instead of the usual plaster board, notwithstanding the latter was in good supply. When Block objected to the

metal lath specifications and inquired as to the reason, he was told by Pool that the duplexes and apartments were being built for rental purposes and not for resale. Other parts of the buildings were also governed by unusually stringent specifications. These included larger foundations, better carpentry work, better stucco, more nailing and reinforcing. The interior finish and painting were also better than customary in houses built for resale. The testimony was that the reason for this was because they were to be a permanent investment of the taxpayers. [R. 221-233, 236-237, 512-513.]

19. The head of Navy Housing in the Los Angeles area in 1945 offered on behalf of the Navy to purchase the tract containing the 100 duplexes. The taxpayers refused to sell. As a result the Navy condemned another tract on which the taxpayers intended to build 192 additional units. [R. 187-188.]

20. An Official of Navy Housing talked to Murphy and Pool numerous times about the purchase of the 100 duplexes. He visited them on an average of three times a week. He also spoke on several occasions of purchasing the other duplexes and apartments on behalf of the Navy. At one time there was a conference with various Navy officials and Murphy's and Pool's attorney with respect to possible purchase. There was no disagreement about price. Murphy and Pool were insistent that none of the properties was for sale. [R. 188-189.]

21. Numerous tenants from time to time offered to buy particular units. They were consistently told the properties were not for sale and none of them was ever sold to tenants. None of the leases carried a purchase-option provision. Real estate brokers frequently inquired whether they were for sale and were always informed they

were not. Friends had advised selling immediately after the war, but Murphy and Pool rejected the advice. [R. 54, 189, 232-233, 467, 508-509.]

22. Artcraft's general auditor, George Clark, wrote to the housing director of Douglas Aircraft Corporation and stated that Artcraft would agree to hold all the rental units for Douglas employees. A letter of January 9, 1945, signed by Murphy, supplemented the letter of January 5, but stated Artcraft intended to build 400 two-bedroom units which would be rented exclusively to Douglas employees for a minimum of two years. The 400 units referred to the duplexes which had already been completed and the 100 additional units the Associates proposed to have built on the land condemned by the Navy. The policy of renting to Douglas employees continued until after the war. [R. 215-218; Exs. 26 and 27.]

23. Although there were restrictions on the sale price on which a house built on priorities could be sold until revoked by Executive Order on August 15, 1945, the restrictions were not a barrier to the sale of taxpayers' housing units at their fair market value because (National Housing Authority General Order Number 60-3-B) the restrictions were that each dwelling unit could be sold for a maximum of \$6,000 (*i.e.*, \$12,000 a duplex) or the fair market value, whichever was less. [R. 40-41, 370; Exs. A-1, B-2, N-13, Sec. 2.04(d), Ex. H-8(d).]

24. The market value of housing units did not rise appreciably as a result of the revocation in October, 1945, of the War Production Board's restrictions on resale prices on war priority housing. When service men returned in large numbers the market prices of houses did rise markedly in Southern California, beginning in the latter part of February, 1946, and continuing to its peak in 1947. [R. 57, 262, 376-377, 443.]

25. Attempts were made by taxpayers to secure higher rentals for property in the latter part of 1945 and early in 1946. The Rent Control Board disapproved the requested increases. After failure to secure permission to increase rents, the taxpayers' attorney, P. M. Swaffield, advised taxpayers not to renew existing leases or to sign written leases on new rentals, because the lease, under the circumstances, benefited only the tenant. He advised that if rent control should be repealed, as in his opinion it would be sooner or later, the taxpayers would be in a position to increase rentals if there were no leases. Taxpayers acted on the advice and refused to enter into written leases solely for this reason. As a result, the last written lease on the 100 duplexes was entered into on April 10, 1946. [R. 54, 176-177, 353-355, 430-432.]

26. At some time in January or February, 1946, Philip Boland, who throughout his business life had been engaged in one capacity or another as a real estate broker, was on terminal leave from the Air Force. He visited Pool and Murphy and suggested that he be allowed to sell their properties for them. The proposal was not accepted. In April, 1946, Boland again approached Pool and Murphy in an attempt to induce them to permit him to sell the 22 apartments and 170 duplexes. He argued that this was the opportune time to sell. There was a buyer's market, and the demand was great for any kind of living quarters. After a great deal of discussion and persuasion, an agreement was made to permit Boland to sell the 70 duplexes. Even after Pool gave his consent it was with reluctance and misgivings. In addition to the arguments of Boland, taxpayers' certified public accountant, Erwin Lampe of Arthur Young & Company, concluded that the properties should be sold, in view of the fact that rental income was restricted by rent control and

that in his opinion the prevailing prices were at a peak which would decline with the passage of time. He argued that the proceeds could be invested in property that would produce much greater income. His computations disclosed a substantial rental income but the tabulations which he prepared established that if depreciation should be computed on the current market value of such housing, instead of actual cost, no profit would be reflected. Murphy inquired in May, 1946, whether the gains on the sale of the properties would receive capital gain treatment. He was taken by Lampe to his senior in Arthur Young & Company, who advised Murphy the gains would be taxable as long term capital gains. [R. 57-59, 193-196, 261-264, 266, 442-443.]

27. Boland among other things pointed out that the probable sales price of the 70 duplexes would be in the neighborhood of \$12,000, and that they had cost but \$6,000. Despite Boland's insistence on selling all the duplexes, as well as the apartments, taxpayers agreed to sell only the 70 duplexes. These were chosen for sale rather than the 100 duplexes or the apartments because they were not quite as good buildings. Substitution of some materials had been required, due to war exigencies, when they were built. When Boland was refused permission to sell the 22 apartments and the 100 duplexes, it was the intention of both Pool and Murphy to retain them, because Pool was reluctant to sell even the 70 duplexes, and Murphy concluded they should be retained as part of a diversified investment program. Both of them hoped rent control would be eliminated which would make the remaining rental properties a better investment. [R. 195-197, 204, 259-263, 357, 378-379, 395, 426-427, 453, 471, 472, 510.]

28. Boland wanted taxpayers to pay him the customary broker's commission of 5 per cent for selling the 70 duplexes. An agreement was ultimately reached to pay him \$500 a duplex, which was a little less than 5 per cent of the selling price. Boland was given the right to use Artcraft's office, telephone and certain other facilities because no other office building was available close enough to the duplexes, and there would be a long delay in securing a telephone. Boland performed all the duties of an independent real estate broker. He advertised the property, showed the houses, wrote contracts, initiated the escrows, checked credit, and did everything necessary to sell the properties. Murphy and Pool occasionally came to the office when they were in town during that period, but gave no assistance whatsoever in making the sales, other than with their wives to sign the deeds as required. [R. 59-60, 197-201, 285, 379-380, 468, 469, 516, 524.]

29. Boland worked full time on the sale of the duplexes and in addition had a woman employee and two salesmen. He also obtained "some" help from Artcraft's bookkeeper, Mrs. Woodruff. Boland personally prepared all the newspaper and other advertising pertaining to the sales. He used Artcraft's name in the advertising, although he knew Artcraft was not selling the houses. Boland felt there was nothing unusual or misleading in implying Artcraft was the seller, when in fact it was not the owner but the builder, because the tract was known as "Artcraft Manor," and he concluded that it was desirable to identify Artcraft with the sale. Murphy and Pool were never consulted about the advertisements and had nothing to do with them. [R. 207, 266-268, 280, 282, 284, 285, 380-384, 468-469, 516-517.]

30. The first deposit on the 70 duplexes was taken May 4, 1946, and within ten weeks' time sales had been

closed or deposits had been taken on all 70 of the duplexes. [R. 60.]

31. Sixty-four of the 70 duplexes were sold for \$11,800 per building, and 6 for \$12,200. Of the 100 duplexes, 91 were sold at \$13,000 per building, 8 at \$13,250, and the last was sold in 1948 at \$10,592.01. [R. 64.]

32. After completing the sale of the 70 duplexes Boland took a trip to Missouri and on his return to the Long Beach area about the middle of July, 1946, he continued to urge Murphy and Pool to sell the 100 duplexes and the 22 apartments. Boland pointed out that he could obtain a higher price by selling each duplex to two veterans, rather than to sell the duplex to a single owner as he had in the case of the 70 duplexes. Also, it was becoming increasingly clear that rent control would not soon be revoked. Finally, by utilizing "GI" terms it was possible to arrange for no down payment from the purchasers, something that had never been done in this area previously. As a result of all these considerations Murphy and Pool finally consented to the sale of the 100 duplexes, but refused to sell the 22 apartments or the market building. [R. 60-61, 202-204, 387-388, 394-395, 427, 509-510; Ex. N-14.]

33. The 100 duplexes were sold in the same manner as were the 70. Boland contracted to sell them and had full responsibility for every phase of the sale, and neither Pool nor Murphy had anything to do with the sales except for the signing of deeds, and some help from Murphy in arranging for necessary financing after the Bank of America refused to finance sales of a single building made to two persons. In Boland's words [R. 380]: "Well, for me it was merely a question of taking over the entire deal and selling it as I chose, as long as they told me what

they wanted for the building and what I was to get. I would use whatever method was satisfactory to sell those buildings.” As was the case with the 70 duplexes, the advertising and the sale of the 100 duplexes was prepared by Boland personally with no help, consent or knowledge of taxpayers. [R. 205-206, 380, 383, 384, 388, 390, 391, 471, 516-517.]

34. All but 20 of the 100 duplexes were sold by the end of 1946. Most of the rest were sold early in 1947. The exact dates on which deposits were taken, the escrows started, the deeds executed, and the transactions closed are summarized in The Tax Court’s Findings of Fact. [R. 63.]

35. Taxpayers held title to all of the 70 duplexes and the 100 duplexes in excess of six months. [R. 52, 63.]<sup>3</sup>

36. In 1949, taxpayers decided to sell the 22 apartment buildings on Tract 11674. There were a number of vacancies and they were no longer a good investment. They were sold in the latter part of 1949 and the early part of 1950 through an independent broker, Marshall A. Smith, with no assistance or supervision by the taxpayers. The gain from the sale of the 22 apartments is not before this Court.<sup>4</sup> [R. 219-220, 473-474.]

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<sup>3</sup>See footnote 2, *supra*.

<sup>4</sup>The Commissioner determined deficiencies for 1950 arising from those transactions concluding that the apartment buildings acquired by taxpayers in 1944 and rented continuously for over 5 years was also property held for sale to customers in the ordinary course of taxpayers’ trade or business. Petitions were filed in the Tax Court but the cases did not reach trial status until after the subject cases had been tried. Accordingly, the parties, in a joint motion, approved



37. The market building which taxpayers acquire in 1944 was still owned by them at the time of the trial of these cases in 1953. The various stores in the building had been rented during the entire period of ownership by the taxpayers. They had frequently been asked to sell, but had always refused because, unlike the duplexes and apartments, commercial properties were not subject to rent control, and continued to be an excellent investment. [R. 214-215, 516; Ex. I-9.]

38. The money which taxpayers received from the sale of various properties was variously invested, principally in securities. Some of it, however, was invested in a building which contained a bank and 6 retail stores. This building was built in 1948 and was held for rental purposes until disposed of by them in 1952 in a forced sale under threat of foreclosure. [R. 210-213, 514.]

39. After Artcraft ceased to build any buildings with the completion of the 100 duplexes in 1945, Murphy and Pool were semi-retired. They gave some attention to the various real estate which they owned and later to their investments in the stock market. In 1950 they organized corporations in New Mexico and Colorado, and became officers and employees of those corporations. The corporations were organized to build houses for sale in the states of incorporation. [R. 210-211, 350-351, 362-363, 514-515, 67.]

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by the Court, asked that the cases be put on the inactive calendar until final disposition of the subject cases, at which time they would either be settled or tried. The Tax Court Docket number for the William K. and Edna Murphy case is 43231, and for Edward and Lottie Pool, 43324. The two cases are still pending before the Tax Court.

40. For the fiscal years ended January 31, 1945 through 1948, inclusive, Edward Pool and Associates realized net rentals from the market building, from the apartment buildings, the 70 duplexes and from the 100 duplexes as follows [R. 65-66]:

<u>Year Ended Jan. 31</u>	<u>Market Building</u>	<u>Tract 11674 22 Multiples</u>	<u>Tract 11451 70 duplexes</u>	<u>Tract 13163 100 duplexes</u>	<u>Total Net Income</u>
1945	\$ 2,235.17	\$ 4,533.55	\$ 9,274.23	—	\$ 16,042.95
1946	15,994.60	8,399.10	11,356.05	—	35,749.75
1947	19,567.18	6,997.97	(3,886.13)	\$21,597.29	44,276.31
1948	16,008.70	(2,131.51)	—	(2,491.07)	11,386.12
	<u>\$53,805.65</u>	<u>\$17,799.11</u>	<u>\$16,744.15</u>	<u>\$19,106.22</u>	<u>\$107,455.13</u>

41. Neither Murphy nor Pool nor their wives have ever held a real estate broker's license. None of them has ever bought or sold property for his own account or for others with the exception of the property giving rise to this controversy, the 22 apartments, the market building and the bank building and various houses which Pool had built and sold as a building contractor in Cincinnati, Ohio, in the 1930's. [R. 139-144, 505-507, 523.]

42. The 22 apartments, 70 duplexes and 100 duplexes were acquired by the taxpayers solely as an investment for the purpose of securing rental income. The 70 duplexes were so held until May, 1945, when it was decided to sell them in order to convert the proceeds into a better investment. The 100 duplexes were so held until the decision was made in August, 1946, to sell them in order to convert the proceeds into a better investment. The 22 apartments were so held until it was decided to sell them in 1949 because they were no longer a good investment. The 70 duplexes and the 100 duplexes were real property used in taxpayers' trade or business held for more than six months and were not held by Associates in the taxable years involved, or at any other time,

primarily for sale to customers in the ordinary course of their trade or business. [Entire Record.]

43. The Tax Court found presumably as an ultimate fact [R. 70] that

“Beginning with the employment of Boland the four individual petitioners herein began a business of selling real estate, and from April 1946 the 70 duplexes on Tract 11451, and from July 1946 the 100 duplexes on Tract 13163 were held by them primarily for sale to customers in the ordinary course of that business.”

### Summary of Argument.

1. The Tax Court concluded that from the date taxpayers decided to sell their duplexes, they held them primarily for sale to customers in the ordinary course of their business within the meaning of Section 117(j) of the 1939 Internal Revenue Code. This conclusion of ultimate fact depends on the application of principles of law and therefore under controlling decisions is fully reviewable here. Even if it should be viewed as a question of fact, the decision should be reversed, because The Tax Court's conclusion is not only “clearly erroneous” within the use of that phrase in Rule 52(a), Federal Rules of Civil Procedure, but finds no support in the record at all.

2. The purpose of Section 117(j) is to afford capital gain to the *sale* of *investment* property. This record clearly establishes that this was investment property. It was sold.

That taxpayers acquired the duplexes for a long term investment is clear from every event disclosed by the record, by the unequivocal and uncontradicted testimony of taxpayers which was itself corroborated by uncontradicted and unimpeached testimony of disinterested witnesses and

by documentary evidence. The Tax Court after failing to make a finding on this crucial issue of fact was "convinced" in its opinion that the taxpayer Pool had an original and continuing investment intention, but had doubt as to Murphy. But even disregarding Murphy's testimony as The Tax Court apparently did, which is itself reversible error under the circumstances here, the record is as clear as to Murphy's investment intention as it is as to Pool's.

3. The method of sale resulted in a large number of sales, but taxpayers had a large number of duplexes. The cases consistently hold that there is not in this field one result for the large investor and another for the small.

Nor did the manner in which the sale was carried out convert the act of liquidating the investment into a business. Taxpayers made two contracts with an independent broker who for a flat commission per duplex took full responsibility for the sales, made all the decisions and either through himself or *his* employees did all of the many acts required to sell 170 duplexes in a short period of time. Taxpayers with but incidental exceptions merely signed the deeds and received the money. This on the basis of the statute's history and the cases interpreting it was the broker's business, not taxpayers'.

The Tax Court's conclusion to the contrary stems from a reoccurring misconception of controlling authority as evidenced by its numerous reversals on this question. The facts of this case in the light of that authority make this one of the clearest cases for the application of Section 117(j) to come before the courts.

## ARGUMENT.

TAXPAYERS' SALE OF THEIR DUPLEXES RESULTED IN LONG TERM CAPITAL GAIN UNDER SECTION 117(j) OF THE 1939 CODE BECAUSE THE BUILDINGS WERE ADMITTEDLY REAL PROPERTY USED IN THEIR RENTAL BUSINESS, AND THE TAX COURT'S CONCLUSION THAT THE PROPERTY WAS HELD PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF TAXPAYERS' TRADE OR BUSINESS IS ERRONEOUS.

### I.

The Tax Court's Ultimate Conclusion That the Property Was so Held Is Fully Reviewable by This Court.

Section 117(j) of the Internal Revenue Code of 1939 provides capital gain treatment for "real property used in the trade or business, held for more than six months which is not \* \* \* (B) *property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.*" There is no question here whether the apartments and duplexes were used in taxpayers' business. Referring to the property The Tax Court stated in its opinion [R. 83] "and before being placed on the market, were used in the conduct of a rental business." The only controversy before the Court is concerning the italicized portion of the definition of Section 117(j) assets, *supra*. The Tax Court concluded [R. 70] that beginning with the employment of Boland taxpayers "began" a business of selling real estate and held the property from that time "primarily for sale to customers in the ordinary course of that business." But this "finding" is a finding of ultimate fact which accurately viewed is a conclusion of law based on legal reasoning from evidentiary facts.

Based on the evidentiary facts found by the Tax Court its ultimate conclusion constitutes an error of law. Whether an error of law has been committed by a lower court, or as here a quasi-judicial body of the administrative branch of the Federal Government, is a peculiarly appropriate determination for an appellate court to make.

The short proof that this is an accurate statement of the scope of review is that merely since the time the subject cases were tried before the Tax Court, that Court has been reversed on the identical issue involved here by this Court in *McGah v. Commissioner*, 210 F. 2d 769; by the Third Circuit in *Curtis Company v. Commissioner*, 232 F. 2d 167; by the Eighth Circuit in *Dillon v. Commissioner*, 213 F. 2d 218, and in *Greenspon v. Commissioner*, 229 F. 2d 947; by the Tenth Circuit in *Victory Housing No. 2, Inc. v. Commissioner*, 205 F. 2d 371; by the Fifth Circuit in *Goldberg v. Commissioner*, 223 F. 2d 709. See also the Seventh Circuit's reversal of the District Court in *Chandler v. United States*, 226 F. 2d 403.

This Court correctly pointed out in *McGah v. Commissioner, supra*, that (p. 771): "While giving careful consideration to the finding of the Tax Court, we draw our own inferences from undisputed facts. *Gillette's Estate v. Commissioner of Internal Revenue*, 9 Cir., 1950, 182 F. 2d 1010; *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 9 Cir., 1949, 178 F. 2d 541." Continuing, the Court stated that: "A consideration of the entire evidence leaves us with the firm conviction that a mistake has been made in this case."

The Third Circuit in *Curtis Company v. Commissioner, supra*, reached the same conclusion, this time too with respect to the identical question involved in this case. In

the words (p. 168) of its opinion in *Sears, Roebuck & Co. v. Johnson*, 219 F. 2d 590, 591, it stated: "The District Court found as a fact that expatriation had taken place. With respect to that finding it must immediately be noted that it was in the nature of an ultimate finding of fact and on that score it is well settled that such a finding is but a legal inference from other facts and as such is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court \* \* \*." Citing *Lehmann v. Acheson*, 206 F. 2d 592, 594 (C. A. 3rd, 1953), and *Goldberg v. Commissioner, supra*, at page 711. The same point was made by the Fifth Circuit in *Goldberg v. Commissioner, supra*, again on the identical question involved here by quoting from its prior opinion in *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217, 219 (1954):

"Insofar \* \* \* as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so-called "clearly erroneous" rule.' *Lehmann v. Acheson* (3 Cir.), 206 F. 2d 592, 594."

The Court continued:

"As succinctly stated by Professor Moore, 'Findings of fact that are induced by an erroneous view of the law are not binding. Nor are findings that combine both fact and law, when there is error as to the law.' 5 Moore's Federal Practice, 2d Ed., Sec. 52.03 (3) \* \* \*."

The Fifth Circuit concluded on this point that (p. 712): "We are convinced that the finding of the Tax Court was the result of an erroneous view of the law, and proceed now to state our view of the substantive law involved."

This is in accordance with the expressed views of the Supreme Court. Mr. Justice Frankfurter, speaking for the Court, stated in *Baumgartner v. United States*, 322 U. S. 665, 670, 671, 64 S. Ct. 1240, 1243, 88 L. Ed. 1525: "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. \* \* \* Finding so-called ultimate facts more clearly implies the application of standards of law. \* \* \*"

That this Court has not changed its mind as to the scope of review of a so-called question of ultimate fact under the Internal Revenue Code is abundantly illustrated by its decision entered February 28, 1957, in *Earle v. Woodlaw, et al.* (not yet officially reported), reversing, and remanding to, the District Court. There an analogous question of whether a particular corporate distribution is a liquidating dividend within the meaning of Section 115(c) of the 1939 Code or "essentially equivalent to the distribution of a taxable dividend" within the meaning of Section 115(g) was involved. This Court stated that the District Court's finding that the transaction was not essentially equivalent to the distribution of a taxable dividend, together with another finding, "are at best combined findings of fact and conclusions of law, if not purely conclusions of law. (Cf. *Thornley v. C. I. R.*, 147 F. 2d 416.)"

We think it beyond question on the strength of these decisions of this Court and the other courts of appeals that there is no question of the authority of this Court to independently examine the conclusion on which the applicability or non-applicability of Section 117(j) turns, free of the "clearly erroneous" rule. (See I. R. C. of 1954, Sec. 7482; Fed. Rules Civ. Proc., Rule 52(a), 28 U. S. C.) In any event, for the reasons which we will detail in the subsequent portions of the Argument, even if this Court were bound by the scope of re-



view in connection with primary findings of fact, namely, that reversal may not occur unless the findings of the trier of fact are “clearly erroneous,” it will be abundantly clear that the ultimate finding of the Tax Court is “clearly erroneous.” Indeed, as we shall show, no other finding is permissible on this record other than that the property in question was not primarily held for sale to customers in the ordinary course of taxpayers’ trade or business.

## II.

### **The Tax Court’s Opinion Reflects a Misconception of the Well Settled Principle That an Investment Purpose Is a Material Factor in the Applicability of Section 117(j).**

For reasons which we will document fully, *infra*, there can be no question on this record that taxpayers acquired and held the property in question as an investment with the sole objective of securing rental income. We will further establish that there is no question either that they disposed of some of this property (but retained others) for valid economic reasons that were not anticipated when the property was acquired. Finally, we will show (Argument, part III, *infra*) that when the decision to sell was finally made, the sale was accomplished as simply, expeditiously and as far as any efforts of these taxpayers are concerned, as passively as was possible so to do.

A. If these are the facts of this case, we think it is plain from the decisions of this and other Courts of Appeals for the various Circuits that taxpayers’ sales come squarely within the provisions of Section 117(j).

While it is true in Section 117(j) cases, as the Tax Court, said that [R. 82], “each case must stand on its own peculiar facts and circumstances,” nevertheless the facts and circumstances that direct a particular result

must stem from principles which have been evolved to give effect to the statutory language and the Congressional purpose in enacting that language. One reads the opinion below in vain if his purpose is to discover such principles.<sup>5</sup>

Despite the number of times this issue has been before the Tax Court its conclusions appear to have been reversed by the Courts of Appeals as often as they are affirmed. The repudiated view of the Tax Court so evidenced is that regardless of original purpose in acquiring, and continued holding, for investment, once a decision to sell is reached, particularly where, as here, the number of units is large, taxpayers are *ipso facto* holding for sale within the prohibition in Section 117(j).<sup>6</sup> That this cannot be the meaning of Section 117(j) is clear on its face. If no sales take place no question of gain arises. Yet once a decision to sell is reached, the property must necessarily be held for sale. If such a decision, carried out, results in a business just because, as here, there is a large number of investment units, the manifest purpose of Congress in enacting the section, to give capital gain treatment to investment property, has been nullified.

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<sup>5</sup>Indeed, the lack of any real standard by the Tax Court in deciding these cases is epitomized by its statement [R. 87] that there have been many cases under Section 117(j), that they all "have points of resemblance" and all have "points of difference" and the decisions in "approximately equal numbers" have been for or against application of Section 117(j).

<sup>6</sup>There can be no question that this is so as to Mr. and Mrs. Pool even on the Tax Court's view of the record because, as emphasized *infra*, the Court said [R. 82] it was "satisfied" that Pool had only an investment purpose and only with reluctance, "agreed to bring the rental venture to an end." Yet, it held that Section 117(j) did not apply to him.

"Congress intended to alleviate the burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect 'investment property' as distinguished from 'stock in trade,' or property bought and sold for a profit." (*Rollingwood Corp. v. Commissioner*, 190 F. 2d 263, 266-267 (C. A. 9th, 1951).)<sup>7</sup> Or, as the Third Circuit put it in *Curtis Company v. Commissioner, supra*, the sale of an investment property in order to invest in something else (p. 170, fn. 8) "is precisely \* \* \* [the] sort of thing which prompted the passage of the capital gains provision. Capital gains were taxed at lower rates to relieve the taxpayer from 'excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions.' *Burnet v. Harmel*, 1932, 287 U. S. 103, 106 \* \* \*"

The importance of an investment purpose for acquiring and holding property has been emphasized in a long line of decisions by this and other courts which represents the overwhelming weight of authority. The manifest failure of the Tax Court to follow this controlling authority re-

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<sup>7</sup>This Court in *Rollingwood* continued that (p. 267) "It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is sale." Although the Court there affirmed the Tax Court's decision that Section 117(j) was inapplicable it did so on facts not only different but the opposite of those here. It was abundantly clear in *Rollingwood* that the original purpose was to sell and therefore the houses were never "investment" property. See pp. 265 and 266, and particularly fn. 2. See also fn. 10, *infra*.

quires that its decision be reversed. (*McGah v. Commissioner, supra*,<sup>8</sup> *Curtis Company v. Commissioner, supra*; *Chandler v. United States, supra*; *Dillon v. Commissioner, supra*; *Goldberg v. Commissioner, supra*; *Victory Housing No. 2, Inc. v. Commissioner, supra*,<sup>9</sup> *Ross v. Commissioner*, 227 F. 2d 265 (C. A. 5th); *Camp v. Murray*, 226 F. 2d 931 (C. A. 4th); *Smith v. Dunn*, 224 F. 2d

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<sup>8</sup>The first opinion of this Court is reported at 193 F. 2d 662 and the second in 210 F. 2d 769. The Tax Court's opinions are reported at 15 T. C. 69 and 17 T. C. 1458. It also involved the applicability of Section 117(j) to the disposition of war housing units. In remanding to the Tax Court this Court stated in its first opinion (p. 663): "The Tax Court found that, at the time of their sale, the 14 houses were held by petitioners primarily for sale to customers in the ordinary course of petitioners' trade or business. There was, however, no finding as to whether the 14 houses were so held prior to their sale, or as to when and how long, if at all, the 14 houses were so held prior to their sale. Such findings should be made." It is apparent that in remanding the case for this reason, this Court emphasized, as the other Courts of Appeals have repeatedly done, that the original intention of holding for investment is a material inquiry in the application of Section 117(j), although the Tax Court did not agree and apparently still does not.

<sup>9</sup>The point is illustrated by Judge Murdock's dissenting opinion in *Victory Housing No. 2, Inc. v. Commissioner*, 18 T. C. 466, 476, whose conclusion was approved by the Court of Appeals for the Tenth Circuit which reversed the Tax Court's decision. 205 F. 2d 371. Judge Murdock stated that neither in the majority opinion nor in other decided cases is found a "satisfactory rationale" in regard to the application of Section 117(j). He pointed out that back of 117(j) is the Congressional purpose to tax the profit on the sale of investment property which occurs because of an increase in value during the period the property was held as an investment at capital gain rates rather than ordinary income which results from sales to customers in the conduct of a business. He then emphasized that "A decision of the owner to sell must necessarily preclude every sale and after he makes that decision he is holding the property for sale" until sold. He concluded that a taxpayer such as Victory Housing, organized to construct rental properties and not to sell, "should be permitted to sell even a substantial number of its units, at least through a broker, without losing the benefit of Section 117(j), and if that can happen in any case, I do not understand what there is about this case which prevents the application of 117(j)." As already stated neither could the Tenth Circuit.

353 (C. A. 5th); *Consolidated Naval Stores Company v. Fahs*, 227 F. 2d 923 (C. A. 5th); *Delsing v. United States*, 186 F. 2d 59 (C. A. 5th); *Fahs v. Crawford*, 161 F. 2d 315 (C. A. 5th).) Compare, for example, such cases reaching a contrary conclusion, largely because the purpose for which the property was acquired was sale and not investment, as *Cohn v. Commissioner*, 226 F. 2d 22 (C. A. 9th), where it was admitted in the Tax Court (21 T. C. 90) that the purpose for acquisition was sale; *Rollingwood Corp. v. Commissioner*, *supra*, where this Court observed that the purpose in acquiring was not investment but sale;<sup>10</sup> *Saltzman v. Commissioner*, 227 F. 2d 49 (C. A. 3rd), affirming *per curiam* an unreported decision of the Tax Court, 14 T. C. M. 1955-18, C. C. H. Dec. 20,836 (M). There are many others.

Despite the fact that the "Findings of Fact" here comprise 37 pages of the printed record, there is no finding whatsoever, just as in *McGah v. Commissioner*, *supra*, on the question of the intention for which the duplexes and apartments were *originally acquired and held* until the decision to sell was admittedly made in the spring of 1946. All that the findings contain on this crucial issue is the conclusion [R. 70] that "Beginning with the employment of Boland, the four individual petitioners herein began a business of selling real estate \* \* \*" <sup>11</sup> But this is simply a reflection of the repudiated view that re-

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<sup>10</sup>This Court stated (p. 266) "\* \* \* We think it is fair to say that one of the essential purposes (in acquiring or holding the houses) is the purpose of sale." And in fn. 2 (p. 266) it distinguishes cases cited by the petitioner on the ground that "no facts in the record in the instant case compel the assumption that the houses involved were investment property."

<sup>11</sup>There is comment in the "Opinion" on the question of original and continued investment intention as to Pool, but doubt as to Murphy's. The accuracy of these statements we discuss, *infra*.

ardless of whether investment property is being sold, Section 117(j) is inapplicable because the sale itself will with rare exceptions constitute a business. Since this was done long after the property had been acquired and continuously rented, the purpose for which held prior to the decision to sell has manifestly been omitted.

B. The Tax Court's ultimate finding [R. 70] was merely that *beginning* with the "employment" of Boland, taxpayers "began a business of selling real estate." This finding is not in any respect inconsistent with a conclusion that prior to *that* time the duplexes and apartments were held *solely* for investment. Moreover, in the opinion itself the Tax Court stated [R. 82] that as to "original purpose" it was "satisfied" that it was the "intent and hope" of Pool to "hold them for the production of income through the rental thereof, and that it was with reluctance that he agreed to bring the rental venture to an end and place the 170 duplexes on the market."

We take it that this constitutes an unequivocal conclusion by the Tax Court that Pool not only held solely for investment but in addition was reluctant to sell even when the decision to sell was finally made.

But the Tax Court continued in comments more inexplicable and less justified than any we have observed in our experience with the judicial process [R. 82]: "As to Murphy, however, the record is not so clear. Having observed him in the course of his testimony, taking into account the self-serving character of such testimony and the phrasing of many of the questions to which he responded we are not persuaded that at any time he had

any intent or purpose than to rent or sell the properties, dependent upon which in the end, should appear to him to be the most fruitful or profitable venture.”<sup>12</sup>

The Tax Court’s refusal to give full credence to the unimpeached and uncontradicted testimony of Murphy as to the purpose for which he acquired and held the property was error in itself. In the words of this court, *Grace Bros. v. Commissioner*, 173 F. 2d 170, 174, “It is axiomatic that uncontradicted testimony must be followed. *Chesapeake and Ohio Railway Company v. Martin*, 1931, 283 U. S. 209, 216, 217, 51 S. Ct. 453, 75 L. Ed. 983; *San Francisco Association for Blind v. Industrial Aid for the Blind*, 8 Cir., 1946, 152 F. 2d 532, 536; *Foran v. Commissioner*, 5 Cir., 1948, 165 F. 2d 705.” The court continued that the only exception occurs when “we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or with testimony which is inherently improbable.”

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<sup>12</sup>The Court continued that as to Mrs. Pool and Mrs. Murphy, “the record is wholly silent, and aside from any right of the husband to manage the property of the community, it may well be that, in each instance, the purpose and intent of the husband was the purpose and intent of the wife.” We take it that it was the Tax Court’s view that Murphy’s and Pool’s intent and purpose is to be attributed to their wives. In any event this is the fact and moreover as a matter of law, Pool and Murphy were the managers of the community. The record shows nothing to rebut the normal presumption. Finally, the record is not “wholly silent” on this point. Pool testified [R. 506] that his wife had never been active in his business and that although they had been married forty-three years she had never worked since their marriage. Murphy testified that his wife was never in the office more than once “ever”; that she did not have a real estate broker’s license and had never been associated with real estate of any kind. [R. 200.]

The court concluded "the same principles" have been "repeatedly" applied.<sup>13</sup>

But the Tax Court's error was compounded because Murphy's testimony was not only uncontradicted and unimpeached and not inherently improbable, but on the contrary, confirmed throughout the record by all the events which took place from 1942 to 1950 and at every material point by disinterested witnesses and documentary evidence. We know that a study of the record will permit of no other conclusion.<sup>14</sup>

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<sup>13</sup>*Foran v. Commissioner, supra*, is particularly apropos because the Tax Court there also refused on the basis of the taxpayer's testimony to find an investment purpose under Section 117(j). In reversing the Court of Appeals stated (p. 707), "Here there is direct and positive evidence from the witness who best knows that this property was for 18 months being held for investment and not for sale to customers. His testimony is consistent with every proven fact. He gives a credible reason why it was not for sale and why finally in 1941 he did sell it." The court concluded, "We think the court's refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury." See also *Ross v. Commissioner*, 227 F. 2d 265 (C. A. 5th, 1955); *Herbert v. Riddell*, 103 Fed. Supp. 369, 388, 389, where Chief Judge Yankwich of the District Court concluded (p. 389), "The testimony of *one credible witness* as to a fact, if not contradicted, and if not inherently improbable, is sufficient to establish such fact. The principle obtains in the law of taxation."

<sup>14</sup>The surprising and, to us, shocking comment of the Tax Court that it could not be sure of Murphy's intention, despite his positive testimony is not diminished by the reasons which the Tax Court gives for this conclusion. The first [R. 82] that "Having observed him in the course of his testimony \* \* \*", implies much but tells little. There is nothing to indicate what there was about his testimony that made his positive, consistent and everywhere documented statements unworthy of the Tax Court's belief. The second [R. 82-83], that his testimony was "of a self-serving character" is, of course, true. But where as here the Internal Revenue Code places the burden of proof upon a taxpayer in part concerning a subjective intention, it is a strange rule of law that would exclude from serious consideration the only person who could give it, *because* he is giving it. In *Foran* (fn. 13, *supra*), the Fifth Circuit instead of discrediting such testimony in effect said it was entitled



C. On the basis of primary facts found by the Tax Court alone, *even disregarding Murphy's testimony* as to subjective intent, we think that this *record presents one of the strongest ever to be considered*, showing a firm and undeviating intention to acquire and hold as investment property for the purpose of obtaining rental income. When supplemented by other facts not found by the Tax Court but compelled by the record, the evidence is overwhelming. Indeed, there is nothing in the record that points the other way. These points may be briefly summarized as follows:

**1. The Tax Court Was "Satisfied" That Pool Had Solely an Investment Purpose.**

The Tax Court has stated in its opinion [R. 82] that it was "satisfied that it was the intent and hope of Pool to hold them [duplexes] for the production of income through the rental thereof, and that it was with reluctance that he agreed to bring the rental ventures to an end and place the 170 duplexes on the market." There would

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to special credence because it was "direct and positive evidence from the witness who best knows," and as was said in *Herbert v. Riddell* (fn. 13, *supra*), (pp. 388-389) "But we are not permitted to disregard the unrefuted testimony of a reputable witness *merely because he is a taxpayer*." The third reason [R. 83] "the phrasing of many of the questions to which he responded," is not otherwise explained, but perhaps the court is suggesting that leading questions were put to the witness. A reading of the record, however, will disclose that neither the government nor the court objected to the form of phrasing of the questions to Murphy. Moreover, a study of that record will show that although there were some questions in form leading, as indeed there must inevitably be in any trial of complicated issues, Murphy was a singularly unleadable witness. Finally, the record will show that almost all of the testimony concerning his intention on direct examination was not in response to leading questions and moreover much was as a result of cross-examination.

appear then, even on the Tax Court's analysis, to be no question about Edward and Lottie Pool's undeviating investment intention.

**2. Taxpayers Had a Fully Documented Plan Actually Carried Out to Build and Hold Investment Property That Goes Back to 1942.**

(a) The intention of the parties to acquire and hold investment real estate began in 1942, when a plan was conceived by Pool to have Artcraft build rental property for acquisition by its stockholders. [State., par. 3.]<sup>15</sup>

(b) Pool proposed at a meeting of the Board of Directors of Artcraft on August 18, 1942, that the corporation build "27 income units \* \* \* but this proposal was turned down." [Pet. Ex. 21.] The minutes of Artcraft of February 17, 1943, disclosed that Pool "also reopened the subject of building residential income in two, three and four unit apartments. The subject was discussed and decided not to take any action at this time, but to hold it open for future consideration." [Pet. Ex. 22; State., par. 3.]

(c) The stockholders were to acquire the property and keep it as a permanent investment. [State., par. 3.]

(d) Smith and Cooke, two of the stockholders of Artcraft, objected. Pool's purpose was to have Artcraft build the property, because it was in a position to build since that was its business.

(e) As a result of a deepseated controversy over this question Pool and Murphy ultimately purchased Smith's

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<sup>15</sup>In the interest of conciseness, references will be made to paragraph numbers of our Statement of Facts, *supra*, which are fully annotated to the record.

and Cooke's stock, at which time the way was paved to cause Artcraft to build the 22 apartments. The Tax Court found that [R. 37] Murphy and Pool and their wives purchased all of the stock of the Smiths and Cookes on or about June 1, 1943.<sup>16</sup> [State., par. 3.]

(f) The Federal Housing Administration approved the construction of the 22 apartments on June 1, the same date on which the stock of the Smiths and Cookes were purchased by the Pools and Murphys, and the War Production Board approved the construction six days later, on June 7. [R. 38.]

(g) Pools' and Murphys' plan to acquire duplexes and apartments from the corporation was carried out. The corporation built and the Murphys and Pools acquired 22 apartments of 68 rental units; 70 duplexes; 100 duplexes and a market building. [State., par. 4.]

Accordingly, the record is clear as to a singleness of purpose dated back to 1942 to cause Artcraft to build for its stockholders investment property that would be retained by them as such.<sup>17</sup>

### **3. There Were No Government Restrictions That Prevented Sale of the Duplexes and Apartments.**

Government requirements with respect to war housing were not a factor in taxpayers' investment purpose. Taxpayers' decision to invest in rental housing was directed

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<sup>16</sup>As the Tax Court noted in a footnote in its findings [R. 37, fn. 2], "It was the testimony of both Pool and Murphy that neither Smith nor Cooke desired to engage in the construction of rental housing."

<sup>17</sup>There is no question either, even disregarding Murphy's testimony, that Murphy was in full agreement with Pool's plans. Pool was asked [R. 507-508]: "Q. Was Mr. Murphy agreeable to this? A. Yes, he was agreeable to it."

by their own evaluation of their best economic interests, aided by the advice of friends. They were cognizant of the highly speculative nature of the building business their corporation had been engaged in, and desired a steady income that they could rely on as they grew older. Moreover, they had been asked by officials of Douglas Aircraft and the Federal Housing Administration to build houses to take care of the influx of war workers in Southern California. [State., par. 8.]

**4. Contemporaneous Statements to Government Housing Agencies Under Penalty of Perjury Stated the Sole Purpose of the Construction Was Rental.**

Sworn statements to the government housing agencies involved signed by Murphy show a contemporaneously expressed intention to build solely for rental, and a categorical statement that the houses were not for sale. [State., pars. 9, 10 and 11.]

**5. Taxpayers Were Not Real Estate Brokers and Did Not Buy and Sell Other Property for Speculative Profit.**

None of the taxpayers was a real estate agent, and they purchased no other property during this period or after with the intention of selling at a profit. [State., pars. 39, 41.]

**6. Written One-Year Leases on All Units.**

Everyone of the 308 rental units which they owned were leased for a period on written leases of one year or more. [State., pars. 5 and 6.]

**7. None of the Leases Contained Options to Purchase.**

[Ex. C-7, Stip. par. 14, R. 21-22.]

**8. The Type of Construction Enhanced the Value of the Units for Investment but Not for Sale.**

The construction of the dwelling units was superior to that normally used in houses built for sale, because of taxpayer's belief that this would enhance the value of the property as a long term investment by reducing maintenance costs. The superior nature of the construction was not intended and did not make the units more saleable. [State., par. 18.]

**9. There Were No Government Restrictions That Would Have Prevented the Sale of These Housing Units at Any Time.**

There were no effective restrictions on the sale of this property, even prior to the revocation of all restrictions on August 15, 1945. The restrictions were that each dwelling unit could be sold for a maximum of \$6,000, or the fair market value, whichever was less, and during this period the property could not have been sold at a price in excess of the allowable selling price, because its value was not as high as the ceiling price. [State., par. 23.]

**10. The Removal of All Restrictions Did Not Motivate the Sales.**

After all restrictions were removed on August 15, 1945, taxpayers made no attempt to sell, but in fact refused offers. Leases were continued as late as April 10, 1946. [State., pars. 23, 25, 27, 32.]

**11. Taxpayers Could Have Built Single-Family Homes for Which There Was a Ready Market.**

Taxpayers could have obtained priorities to build single homes for which there was a ready market, but chose to build duplexes and apartments for which there was no ready market. [State., pars. 15, 16 and 17.]

12. **Taxpayers Made no Attempt to Sell Until a Decision to Liquidate the 70 Duplexes Was Reached and Repeatedly Refused to Consider Inquiries of Possible Purchasers and Brokers.**

There were repeated refusals by taxpayers to sell the property :

(a) An official of Navy Housing on numerous occasions sought to purchase the 100 duplexes. [State., par. 20.]

(b) Numerous tenants from time to time offered to buy particular units. [State., par. 21.]

(c) Real estate brokers frequently inquired whether they were for sale. [State., par. 21.]

(d) Friends had advised selling immediately after the war, but the advice was rejected. [State., par. 21.]

13. **There Was Written Evidence of an Offer as Late as January 9, 1945, to Douglas Aircraft to Rent to Their Workers Exclusively for Two Years.**

In addition to individual leases, Murphy wrote to Douglas Aircraft on January 9, 1945, and offered to hold the duplexes, the apartments and an additional 100 duplexes taxpayers were proposing to build solely for Douglas employees for a period of two years. The policy of renting to Douglas employees continued until after the war. [State., par. 22.]

14. **Even When the Decision to Sell the 70 Duplexes Was Reached, There Was No Intention to Sell the Remaining Units.**

The decision was reached solely because of the rapid appreciation in real estate values in the spring of 1946, coupled with the limiting factor of rent control on the

income of the investment, which had so markedly increased in value. These things were pointed out to taxpayers by the real estate agent Boland, by their certified public accountant, Erwin Lampe, and by others. The purpose was to reinvest in property not subject to control of income and to diversify taxpayers' investment. The decision to sell the 100 duplexes was not made until several months after all of the 70 had been sold. As a result of the still further increase in the market value of this property and the urging of the agent Boland a decision to sell the 100 duplexes was made.<sup>18</sup> [State., pars. 26, 24.]

#### **15. Taxpayers Continued in the Rental Business After These Tax Years.**

(a) After the 100 duplexes were sold taxpayers continued to own the 22 apartments until the latter part of 1949 (seven years after the original intention to go into the rental business was first proposed, and six years after the first of the properties was built), and the early part of 1950, when they were sold through an independent real estate broker, due principally to the fact that there were

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<sup>18</sup>The Tax Court noted in footnote 8 of its opinion [R. 58] that "It was Pool's testimony that Murphy got rather enthusiastic as prices went up, but that he, Pool, still didn't want to sell them. He also testified, 'We got so much advice from Mr. Boland, Mr. Boland was so persistent on what they could do, the prices he could get, and naturally there was quite a profit on them, and they just finally overrode me, that's all.'"

While it is accurate that Murphy was easier to persuade as to the economic wisdom of selling the housing investment, it was erroneous to infer from this, as the Tax Court apparently did in part, that Murphy did not have an original and long continuing firm intention to acquire and hold rental housing. The record everywhere confirms the fact that Murphy's decision was solely the result of economic factors that had not and could not have been foreseen.

a large number of vacancies so that they were no longer a very good investment. [State., par. 36.]

(b) They continued to own and hold for rental purposes at the time of the trial of this case in 1953 the market building which taxpayers had acquired during the period when the duplexes were being built. [State., par. 37.]

**16. Taxpayers Used the Proceeds of the Sales to Invest in Other Investments, Principally Securities.**

The money which taxpayers received from the sale of the properties was variously invested, principally in securities. [State., par. 38.]

**17. Taxpayers Neither Before, During nor After Ownership of These Properties Bought and Sold Other Real Estate for the Purpose of Profiting on the Resale.**

Taxpayers, neither as a partnership nor individually had to the date of the trial of these cases purchased or sold<sup>19</sup> any other real estate.<sup>20</sup> After Artcraft built the last of the 100 duplexes in 1945, Murphy and Pool were semi-retired and devoted attention to the various real estate which they owned and to their investments in the stock market. In 1950 they organized corporations in New Mexico and Colorado and became officers and em-

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<sup>19</sup>The only exception was the building of a bank building and six rental stores in 1948, which were rented and held solely for that purpose. They were disposed of in 1952 at a forced sale under threat of foreclosure. [State. Par. 38.]

<sup>20</sup>With but one exception Pool, many years before as a building contractor in Cincinnati, Ohio, in the 1930's had built houses for sale. [State. Par. 41.]



ployees of those companies.<sup>21</sup> [State., pars. 38 and 39.] This case then, unlike many of the troublesome cases under Section 117(j), is not one where the taxpayers were generally speculators or traders in real estate and claimed the particular property as part of a separate investment portfolio, but rather one where at no period relevant to the controversy any of the taxpayers in any sense were real estate traders. This factor alone makes the question of their original investment intention much easier to ascertain than such cases as *Galena Oaks Corporation v. Scofield*, 218 F. 2d 217 (C. A. 5th), which as discussed in detail in Point III *infra*, the Tax Court stated [R. 88] “offer(s) the strongest support for our conclusion” here.

#### 18. Tax Returns of Partnership Showed Business as “Real Estate Rentals.”

The partnership income tax return of the four taxpayers who did business under the name of Edward Pool

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<sup>21</sup>It is clear from these indisputable facts that except for the property involved in these cases and the question of the gain on the 22 apartments still pending before the Tax Court (fn. 4, *supra*) taxpayers neither individually nor collectively, before, during or after the period involved in these cases, dealt speculatively in real estate by buying and selling for a profit. The fact they had stock and were officers of corporations which carried on this activity is not relevant as to their personal status as real estate investors. Artcraft Builders, Inc., the California corporation, as well as Artcraft of New Mexico and Artcraft of Colorado, were taxable entities separate and apart from the individual taxpayers. The doctrine of the separateness of corporate entity has been repeatedly affirmed in income tax cases. The Supreme Court has applied it in distinguishing between the business of a corporation and its stockholders (*Burnet v. Clark*, 287 U. S. 410, 77 L. Ed. 397; *Dalton v. Bowers*, 287 U. S. 404, 77 L. Ed. 389; see also *New Colonial Ice Co. v. Helvering*, 292 U. S. 435 78 L. Ed. 1348). The same court has made it clear that the business of a corporation is not the business of a stockholder or of an officer (*Deputy v. DuPont*, 308 U. S. 488, 84 L. Ed. 416).

and Associates for each of the taxable years stated that the business of the partnership was "real estate rentals." [State., par. 14.]

#### 19. Sound Rental Investment.

The investment proved to be a sound one. In the taxable year ended January 31, 1945, there was net income after all expenses, including depreciation, of \$16,042; for the year 1946, \$35,749; and for the year 1947, \$44,276. [State., par. 40.]

#### 20. Summary.

We think it plain that this case has in it, based on undisputed facts, every factor emphasized in other Section 117(j) cases, showing an investment purpose and none of the factors showing a speculative or trader purpose: To enumerate, the purpose of acquisition of the property was long term investment, not a purpose to await a favorable sales market or the removal of government restrictions; the leases were one year written leases or longer—there were no oral month to month leases or leases with option to buy; the investment was a good rental investment showing substantial net profit each year; there was constant refusal to sell, either as a whole or separately, despite requests from tenants, brokers, the Navy and others; taxpayers were not real estate brokers or otherwise engaged in buying or selling property for their own account or for others either during this time or at any other time;<sup>22</sup> the purpose of the disposition of the property was to liquidate an investment which, while it had been a sound one, was no longer one to retain because the same money invested in other property not subject to control

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<sup>22</sup>See footnote 21, *supra*.

of income would show a much better return due to the tremendous increase in real estate values in Southern California in 1946 and the continuance of rent control, neither of which had been anticipated by Murphy, Pool or their advisers; the purpose motivating the liquidation, as indeed all the purposes relied on here, was actually carried out and the money was invested largely in listed securities; and finally, there was direct testimony of both Pool and Murphy of their intention, everywhere supported in the record and nowhere contradicted or impeached.

### III.

**Taxpayers' Decision First to Permit the Real Estate Agent Boland to Sell the 70 Duplexes and Later to Sell the 100 Did Not Constitute the Beginning of a Business in Which the Taxpayers Held the Property Primarily for Sale to Customers in the Ordinary Course of Their Trade or Business.**

Assuming that the investment intention existed and continued until April and July of 1946, as established in Part II, *supra*, the Tax Court's conclusion that the two contracts with Philip Boland authorizing the sale by him of the 70 and 100 duplexes put taxpayers in the business of selling to *their* customers in the *ordinary* course of that business deprives the phrase "his customers" and "ordinary" in Section 117(j) of any meaningful content.

The purpose of Section 117(j) as previously emphasized is to permit the *sale* of investment property. But once a decision to sell is made, the property is of necessity *held* for sale. The statutory prohibition is not holding for sale but rather to *taxpayer's* "customers" in the "*ordinary course*" of *his* business.

A. A large number of sales in a short period of time, it has been repeatedly held “does not establish a real estate business or the sale of property in the ordinary course of such a business.” (*Curtis Company v. Commissioner, supra*,<sup>23</sup> *Chandler v. United States, supra*.<sup>24</sup>) The courts do not deny capital benefits “simply because a large number of sales are made in a short period.” (*Goldberg v. Commissioner, supra*, p. 712.) The only significance of large numbers is that taxpayer “had a lot of houses to sell \* \* \*.” (*Ross v. Commissioner, supra*, p. 268.)

The reason is that manifestly the nature of the property directs the way it should be sold. As the Seventh Circuit noted in *Chandler v. United States* (p. 406), “The market place is hardly glutted with prospective buyers clamoring “for such amounts of property.” “By the very nature of the case \* \* \* [taxpayers] had to sell the properties a piece at a time.” (*Curtis Company v. Commissioner, supra*.) The court continued (pp. 169-170), “Surely that does not make him a dealer in these parcels of land any more than it would make a man a dealer if he wanted to liquidate his holdings in a corporate stock for which the market was weak so that he had to sell by small parcels instead of by one sale. That is the taxpayer’s situation here.” The Tenth Circuit in *Victory Housing No. 2, Inc., supra*, analogized the large number of rental houses sold there to the situation of a farmer owning 20 separate farms used in a farming business, desires to cease farming and disposes of his holdings by selling them in a short time. It thereupon reversed the

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<sup>23</sup>1098 rental housing units disposed of in tax years.

<sup>24</sup>In 8 tax years the trust sold 290,000 acres of land in 536 separate sales, an average of 59 per year.

decision of the Tax Court in accord with the Tax Court's decision in the instant cases.

B. The statute denies capital gain if there are sales to *taxpayer's* customers in the "ordinary" course of its business. Consistent with that requirement the courts have emphasized that whether a broker acting as an independent contractor with the minimum of supervision that the term "independent contractor" implies under traditional common law concepts is used in the liquidation of an investment, is a significant factor in concluding that the sale is neither to taxpayer's customers nor in the ordinary course of his business. (*Dillon v. Commissioner*, 213 F. 2d 218 (C. A. 8th); *Smith v. Dunn*, 224 F. 2d 356; *Camp v. Murray*, 226 F. 2d 931 (C. A. 4th); *Say v. United States* (D. C. S. D. Calif.), decided Jan. 22, 1957 (not yet reported but found in 1957 C. C. H., Fed. St. Tax Rep., Par. 948). See also *Curtis Company v. Commissioner*, *supra*; *Consolidated Naval Stores Company v. Fahs*, 222 F. 2d 923, 926 (C. A. 5th); *Goldberg v. Commissioner*, *supra*.)

In *Smith v. Dunn*, *supra*, the court emphasized (p. 356) that it was proper to consider whether the sales were in the ordinary course of taxpayer's business "or were carried on independently of the taxpayer's business." It pointed out that the taxpayer employed a broker who acted as an independent contractor. "The taxpayer, as a matter of practice, gave no time to the sale of the lots except that consumed in signing deeds, exercised no supervision or control over prices or advertising or the activities of the broker at all." (P. 357.) These are the facts of this case too. The conclusion from this was that (p. 357), "The efforts of the broker were carried out independently of the taxpayer's business and were conducted as a part

of the broker's own business and at his own expense and without anything but the most general supervision on the part of the taxpayer."

Here, it is clear that the broker Boland after the agreement was reached to pay him a flat sum of \$500 per house, took full responsibility for all of the sales and performed all the duties of an independent contractor in the real estate field. He wrote and paid for the advertising copy, showed the houses, wrote the contracts, initiated the escrows, checked the credit—in short, did everything necessary to sell the property.<sup>25</sup> [State., par. 28.]

The Tax Court concluded that whether an independent real estate broker is used is irrelevant.<sup>26</sup> [R. 84.] This, we have already shown, is contrary to the decided cases.

<sup>25</sup>For example, he testified in response to the question as to what his duties were [R. 380]. "General duties as a real estate broker. Q. What are they? A. Well, for me it was merely a question of taking over the entire deal and selling it as I chose, as long as they told me what they wanted for the building and what I was to get. I would use whatever method I presumed was satisfactory to sell those buildings. \* \* \* A. I reserve the right when I make a deal to sell the way I want or—" [R. 383].

<sup>26</sup>The Tax Court cites cases to the effect that the liquidation of property may or may not be the conduct of a trade or business, depending upon circumstances. This is a proposition which is correct insofar as it goes, as we show *infra*. Its conclusion "that for the same reasons" the use of the broker is immaterial finds no support in these cases and is indeed a *non sequitur*. Its sole other authority for disregarding one of the controlling facts of this case, the use of the broker, is that taxpayers "unwittingly" admitted the correctness of this proposition by agreement that Artcraft used a broker when it built houses for sale and nevertheless reported the income as ordinary income. This astonishing conclusion is based on a fundamental misconception, since the first requirement of Section 117(j), *i.e.*, that property subject to depreciation be used in the trade or business of a taxpayer, was not and could not have been satisfied by Artcraft, the business of which was to build houses for sale, and therefore the manner of the sale, whether by broker or otherwise, had no relevance.

Obviously not sure of this position, the Tax Court then broadly implies without quite stating that perhaps Boland was not an independent broker, giving as a reason that he didn't receive [R. 86] "the regularly established commission of five per cent on sales." But the test of whether he is an independent broker is not the rate of his commission but<sup>27</sup> (27 Am. Jur. 485):

"It has been held that the test of what constitutes independent service lies in the control exercised, the decisive question being as to who has the right to direct what shall be done, and when and how it shall be done. It has also been held that commonly recognized tests of the independent contractor relationship, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies, and materials, his right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer."

As already indicated, all of these tests have been met here. [State., pars. 28, 29.] (1) Boland had complete independence in selling; (2) there was a contract calling for payment of \$500 a house; (3) it was a contract for

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<sup>27</sup>Indeed, there was direct testimony from Boland that although 5 per cent was traditional, brokers were free to agree on any other amount and that it was only in the absence of an agreement that the Real Estate Board supported the broker on a 5 per cent figure. [R. 379.]

a specific job; (4) the business of a real estate broker is a well recognized, distinct occupation; (5) Boland employed a secretary and two salesmen and had sole authority to supervise them; (6) Boland paid all expenses except that he was furnished an office and telephone not otherwise available.

It is equally clear on the record that taxpayers had nothing material to do with the sales that could be fairly interpreted as placing them in the business of selling to their customers. The testimony of Murphy, Pool, Boland and Mrs. Woodruff is that taxpayers were practically never present when the sales occurred, that they were often out of town, that Pool did not even talk to Boland about the sales, and that while Murphy on several occasions gave some advice, it was not followed. [R. 384.]

Nor is the Tax Court's apparent conclusion [R. 86-87] bolstered by the factors which it points to, namely, as already discussed, that Boland received \$500 per house rather than 5 per cent, that he used Artcraft's office and telephone, that he occasionally received help from Artcraft's bookkeeper, Mrs. Woodruff,<sup>28</sup> and that Murphy "personally took over and worked at" the financing of the 100 duplexes. The explanation in the record as to the office and telephone was simply that there was no office other than Artcraft's near the duplexes, so it was necessary that Boland use it, and he in a sense paid rent for it by accepting a smaller commission than he had first

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<sup>28</sup>The record is clear that Mrs. Woodruff took her orders from Boland; that he had his own full-time secretary, and on the sale of the 100 duplexes two salesmen in addition, and that Mrs. Woodruff assisted him only "sometimes" and "to some extent." [R. 384, 385, 392, 398.]



asked.<sup>29</sup> As for the telephone, Boland was in the position that thousands were at the end of the war, none was available. He testified that he tried to get one but couldn't. [R. 393.] Moreover, the Tax Court is less than accurate when it states that Murphy worked the financing out, since Mrs. Woodruff and Boland's testimony was that Boland and Murphy did it together.<sup>30</sup> In any event, a few days spent in securing the financing of only part of the duplexes by one of the taxpayers hardly puts the four of them into the real estate business.

The emphasis on these things by the Tax Court in light of the tremendous time and countless decisions that had to be made by Boland, suggests that it is straining at gnats to reach its conclusion. And when it says, as it did [R. 87], "All the facts considered, it would be difficult to imagine a selling operation or business which was more actively conducted and carried on than the one here." we can perhaps agree, but the question which we ask and the Tax Court should have, is "Whose business was it—taxpayers' or Boland's?" The answer must inevitably be the latter's, and the conclusion directed by this is that it would be difficult to imagine taxpayers disposing of 170 duplexes with any less activity on their part.

Finally, in support of the proposition that reliance on an independent contractor is an important factor when used to liquidate investment property, to establish that taxpayers are not holding for sale to their customers in the ordinary course of their business, we note that a duly authorized representative of the Commissioner has within the last year in open court conceded in a case where a

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<sup>29</sup>R. 380; 198-199.

<sup>30</sup>R. 388, 389-390; 483.

broker was not used, "Had taxpayer employed a firm of brokers to sell the properties for it the sales then would not be in the ordinary course of taxpayer's business." (*Curtis Company v. Commissioner, supra* (p. 169).) And the Court of Appeals for the Third Circuit indicated its agreement with that concession with the citation of *Dillon v. Commissioner, supra*, and *Smith v. Dunn, supra*, which, we have already emphasized, so hold.<sup>31</sup>

C. The consistent conclusion of the courts then is, as to the significance of the words "ordinary" and "custom-

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<sup>31</sup>Government counsel at the trial of this case was well aware of the vital importance of the use of an independent broker and through strenuous cross-examination of Mr. Murphy tried to elicit an admission that taxpayers had paid Boland \$85,000 for selling these properties which involved very little work, solely because they had been advised that it would improve their chances of getting capital gain. In response to one such question [R. 284], Murphy testified that they employed Boland because "We weren't in the real estate business and we didn't want to be bothered with them. There was a lot of effort required. In order to make a sale, you have to first show the property. Then you would have to sell it to the people. Then you would have to arrange the financing. Then you would have to open an escrow. Then you would have to check their credit. I don't know what else is required, but I know that much is required and we didn't do any of that." In response to the question that wasn't it rather peculiar for them to pay Boland \$85,000 for doing this work when Pool and Murphy were not themselves busy with other work, Murphy replied, "It doesn't to me. That was the contract I made and I usually live up to my contracts. I did not intend to pay Boland, and I don't think Mr. Pool did, \$85,000 for selling those buildings and then turn around and do the work for him."

Finally, government counsel expressly disclosed the purpose of his line of cross-examination [R. 286] by the question, "Isn't it true, Mr. Murphy, in making the decision on whether or not you would sell the 70 and the 100 duplexes, you were advised taxwise that it would be better to have someone else sell them rather than you? A. That is absolutely not true, positively, no."

We have the spectacle of the Commissioner here charging that taxpayers employed a broker in order to avoid taxes, the Tax Court concluding that a broker is irrelevant, and the representatives of the Commissioner in open court in another case admitting that this is a controlling factor.

ers” in Section 117(j), that the amount of property being sold in itself is immaterial, and whether taxpayers or an independent contractor sells, is highly material.

This conclusion is clearly confirmed by its legislative history. Section 117(j) was added to the 1939 Code by Section 101 of the Revenue Act of 1942. Its purpose is fully documented by this court in its *Rollingwood* opinion, discussed *supra*. But the trade or business limitation in Section 117(j) itself derives from one of the exclusions of the definition of capital asset in Section 117(a)(1)(A). Prior to the Revenue Act of 1934 the words “customer” and “ordinary” were not in the statute. The Committee Reports relating to the 1934 Act disclose that these words were added for the express purpose of *narrowing* the *limitation* on the definition of capital assets. The reason for this was that the 1934 Act became law during the depression and Congress was interested in broadening the definition of capital gain in order to broaden the definition of capital loss, which would by the same token reduce the number of *ordinary* losses, of which here had been so many at the time the 1934 Act was being considered. Specifically, the Committee Reports disclose that the amendments were to make it impossible to contend that a stock speculator, trading on his own account, was not subject to the provisions of Section 117(a)—*i.e.*, his sales were intended to result in capital losses (not the more useful ordinary losses) and therefore as a corollary his gains were to be capital gain. (H. Rep. No. 1385, 73rd Cong., 2d Sess., p. 22, 1939-1, Part II, Cum. Bull. pp. 627, 632.) By the insertion of the words “customers” and “ordinary” in the statute it was intended that even although assets were held primarily for sale, they were not to be denied capital asset status (or achieve ordinary loss status) if their intended sale was not to be in the ordinary course

of taxpayer's business. (*O. L. Burnett v. Commissioner*, 40 B. T. A. 605, 607, 609, aff'd on this point, 118 F. 2d 659 (C. A. 5th); *Fuld v. Commissioner*, 139 F. 2d 465 (C. A. 2d); *Thompson Co. v. Commissioner*, 43 B. T. A. 726; see also *Helvering v. Hammel*, 311 U. S. 504-512, 85 L. Ed. 303; Shaw, "When Does a Seller of Real Estate Become a Dealer," 1950 U. S. C. Tax Institute, 325-327.) The word "ordinary" has the connotation of normal usage or custom. (*Deputy v. DuPont*, 308 U. S. 488-489, 84 L. Ed. 416.)

The reason that the addition of the words "customers" and "ordinary" to Section 117(a)(1)(A) accomplished its purpose of extending the definition of capital loss (and consequently of capital gain) to stock speculators, trading on their own account, is not, of course, that they do not hold securities primarily for sale because by definition they do. Rather, the addition of these words accomplished this result because they do not sell to *their customers* in the "ordinary" course of their business. On the contrary, they sell through independent stock brokers who sell in turn to *their customers* in the ordinary course of *their business*. (*O. L. Burnett v. Commissioner*, *supra*; *Van Suetendael v. Commissioner*, decided September 25, 1944, P-H Memo Op. par. 44,301, aff'd 152 F. 2d 654 (C. A. 2d); see also Clark, "Distinguishing Between Dealer and Investor Sales by the Same Taxpayer," 8 N. Y. U. Institute on Federal Taxation, 855, 857, fn. 7.)

D. We do not wish to be understood that the fact that there is an original investment purpose, or at least a purpose other than to sell for the purpose of making a profit, is always controlling. Neither is the use of a broker to dispose of investment property always controlling. But the Tax Court's error was in its failure to analyze the situation to which the particular tests have relevance.

This court and other Courts of Appeals have repeatedly held that the mere fact that an investment is being liquidated is not sufficient to bring Section 117(j) into play. (*Ehrman v. Commissioner*, 120 F. 2d 607 (C. A. 9th); *Commissioner v. Boeing*, 106 F. 2d 305 (C. A. 9th); *Richards v. Commissioner*, 81 F. 2d 369 (C. A. 9th); *Mauldin v. Commissioner*, 195 F. 2d 714 (C. A. 10th); *Palos Verdes Corp. v. United States*, 201 F. 2d 258 (C. A. 9th); *Snell v. Commissioner*, 97 F. 2d 891 (C. A. 5th); *Oliver v. Commissioner*, 138 F. 2d 910 (C. A. 4th); *Brown v. Commissioner*, 143 F. 2d 468 (C. A. 5th).)

But those cases are distinguishable from this case because the taxpayers there did not merely liquidate what had been investment property. They took the investment property and actively turned it into something else. A typical case is one in which land used for farming, or inherited land, which is improved by being subdivided, roads put in, and the like, and then sold directly by the taxpayers or through agents. Those cases present an entirely different problem because the property that the taxpayers held for investment was not the property that was ultimately sold, and Section 117(j) is inapplicable by its terms because the property ultimately sold, although derived from the investment property, was in fact never used in the trade or business.

E. The Tax Court concluded its opinion by stating that in *Galena Oaks Corporation v. Scofield*, 218 F. 2d 217 (C. A. 5th), aff'd 116 Fed. Supp. 333 (D. C. S. D. Tex.), "The facts appear to us to be in all essential respects comparable to the facts in the instant case. \* \* \* In our view the decisions of the courts therein and the reasons expressed therefor offer the strongest support for our conclusion here."

The case is distinguishable from this one on all of the principles which we have urged throughout this brief. The first is the importance of an investment purpose prior to a final decision to sell, and the second is that the liquidation of that investment in itself must not constitute the carrying on of a trade or business. *Galena Oaks* was decided for the government because the facts on both of these controlling points were clearly adverse to the taxpayer. Thus, as the District Court stated (p. 334), "The Government \* \* \* contends that the taxpayer was in the business of constructing houses for sale; that this program was interrupted as to the 102 houses, only by reason of FHA regulations, by reason of which it was obliged to rent for a matter of three to four years; and that shortly after such restrictions were removed, the taxpayer continued in its normal business of selling \* \* \* I find that the Government is right \* \* \*" (Pp. 334-335.)

In contrast we have established here, that taxpayers were never in the business of constructing houses for sale, that government regulations did not require them to rent, and that after the disposition of the duplexes in question taxpayers continued in the rental business and never went into the business of selling.

As for the manner in which the houses were sold, there, unlike here, the taxpayer itself carried on every activity normally associated with the business of selling real estate, using its own employees and not the services of an independent broker. Thus, it was found by the District Court (p. 334) that one of taxpayer's principal employees was placed in charge of sales; extensive advertising taken in local papers; for sale signs placed at strategic locations; and prospective purchasers contacted

through taxpayer's Houston office. In short, on the basis of both of the points that control in the decision of this case, the facts in *Galena Oaks* were almost the opposite of those here. Accordingly, when the Tax Court states, as it did, that the case offers the "strongest support for our conclusion here" it has shown both the enormity of its misconception of the law applicable to this case, and the utter dearth of authority for its position.

F. There remains to consider as a group the cases decided by this court on the applicability of Section 117(j) to the sale of real estate. An analysis of those cases holding Section 117(j) inapplicable establishes not only that they are clearly distinguishable from the facts of this case, but, in addition, the court's analysis of the problem lends additional support for the reversal of the Tax Court here.

*McGah v. Commissioner, supra*, was a reversal of the Tax Court and held Section 117(j) applicable to the sale of war housing. Although we think the decision of this court was fully justified on the facts, we submit that the investment purpose shown in this case, and the complete passivity of the taxpayers, make this case an *a fortiori* one for reaching the result that the court reached in *McGah*.

*Rollingwood v. Commissioner, supra*, has already been discussed. That case correctly analyzed the purpose of Section 117(j) and properly denied its application because it was clear that taxpayers had always intended to sell. *Cohn v. Commissioner, supra*, likewise was a case where the purpose of acquisition was sale.

In *Homann v. Commissioner*, 230 F. 2d 671, the taxpayer had no investment purpose whatever once the houses were built. They were rented on a month-to-month basis

under an agreement whereby rentals could be applied to purchase prices and taxpayer's agent *always* had authority to sell. To the same effect was *Rubino v. Commissioner*, 186 F. 2d 304, affirming *per curiam Rubino v. Commissioner*, 1949 P-H Memo T. C. 48,288.

In *Shearer v. Smyth*, 221 F. 2d 478 (affirming, *per curiam*, the District Court's decision in 116 Fed. Supp. 230); *Palos Verdes Corp. v. United States*, *supra*; *Ehrman v. Commissioner*, *supra*; *Commissioner v. Boeing*, *supra*, and *Richards v. Commissioner*, *supra*, although the property was not (or may not have been) originally held for sale, the liquidation of the property itself constituted a trade or business, for the reasons that: (1) substantial activity or investment was made in readying the property for sale (such as subdividing and improving), or (2) the sales were made by taxpayer or his employees, not an independent contractor, and were made over a period of years.

The presence of either of these circumstances as we have emphasized has often been treated as indicative of a new business carried on by a taxpayer, despite the fact that an investment is being liquidated. Conversely, where as here taxpayers did not change the form of their investment property in order to sell,<sup>32</sup> and the sale activities were carried on by others, we have a clear case for the application of Section 117(j).

The fact then that a number of cases have been decided by this Circuit against the application of Section 117(j) is, we submit, not indicative of a disagreement with such circuits as the Third, Fourth, Fifth, Seventh, Eighth and

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<sup>32</sup>All of the property was sold strictly as it was when rented. The duplexes were not even repainted. [R. 379.]



Tenth, which have decided cases which require the reversal of the Tax Court here. It is indicative only of the fact that with the exception of *McGah* this is the first case to come before this court which requires the application of Section 117(j) on the basis of standards heretofore so well expressed by this court in such cases as *Rollingwood* and *McGah*, and the Third, Fourth, Fifth, Seventh, Eighth and Tenth Circuits in the cases cited *supra*.

### Conclusion.

The decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted,

IRVING I. AXELRAD,

*Attorney for Petitioners.*

April, 1957.

*Of Counsel:*

MITCHELL, SILBERBERG & KNUPP.



**In the United States Court of Appeals  
for the Ninth Circuit**

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**EDWARD POOL AND LOTTIE POOL, EDWARD POOL,  
LOTTIE POOL, WILLIAM K. MURPHY, EDNA MUR-  
PHY, WILLIAM K. MURPHY AND EDNA MURPHY,  
PETITIONERS**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

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**On Petitions for Review of the Decisions of the  
Tax Court of the United States**

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**BRIEF FOR THE RESPONDENT**

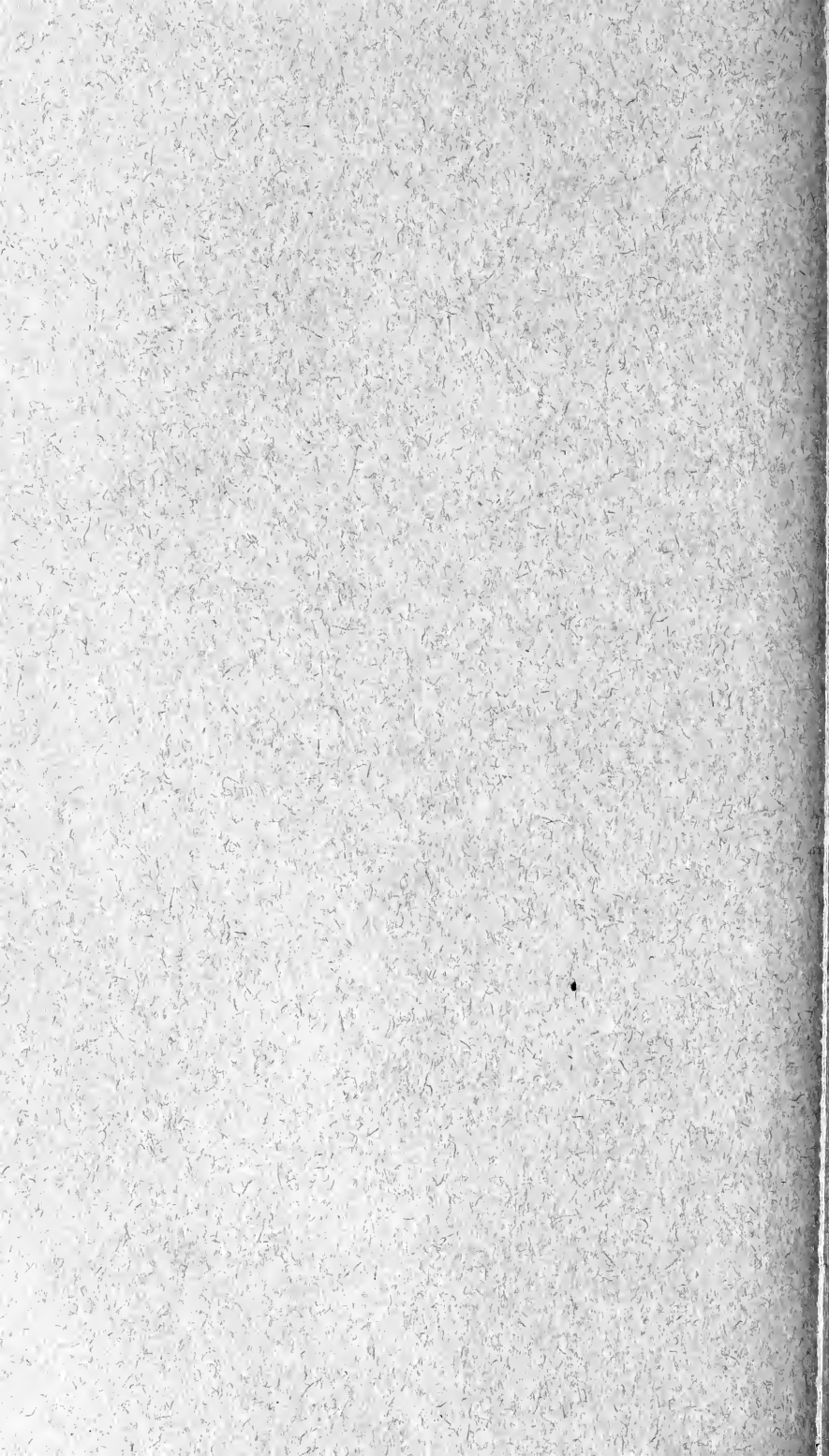
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**FILED**

**MAY 23 1957**



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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 15399

**EDWARD POOL AND LOTTIE POOL, EDWARD POOL,  
LOTTIE POOL, WILLIAM K. MURPHY, EDNA MUR-  
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PETITIONERS**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

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**On Petitions for Review of the Decisions of the  
Tax Court of the United States**

---

**BRIEF FOR THE RESPONDENT**

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**OPINION BELOW**

The findings of fact and opinion of the Tax Court (R. 29-88) are not officially reported.

**JURISDICTION**

This appeal covers six cases which were consolidated by order of the Court (R. 533-535) and originated with the Commissioner's action in determining income tax deficiencies against taxpayers for 1946, 1947 and 1948 (R. 8-12). Taxpayers filed petitions

for review of the deficiencies (see R. 3, 5-8)<sup>1</sup> under the provisions of Section 272 of the Internal Revenue Code of 1939. The decisions of the Tax Court were entered on August 20, 1956. (R. 89-94.) Petitions for review by this Court were filed on November 5, 1956. (R. 95-97.) This Court accordingly has jurisdiction of the cases under Section 7482 of the Internal Revenue Code of 1954.

### QUESTION PRESENTED

Whether the Tax Court erred in concluding that the 70 duplexes on Tract 11451 sold in 1946 and the 99 duplexes on Tract 13163 sold in 1946 and 1947 were held by taxpayers primarily for sale to customers in the ordinary course of their business and that, accordingly, the profits realized from the sale thereof constituted ordinary income, rather than capital gain under 1939 Code Section 117.<sup>2</sup>

### STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

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<sup>1</sup> The record references to the petitions for review by the Tax Court and by this Court are to the documents filed in but one of the six cases, since, pursuant to the Court's order (R. 533-535), the documents in the other cases have not been printed.

<sup>2</sup> The sales, although made in 1946 and 1947, were made in the fiscal years ended January 31, 1947, and January 31, 1948, of Edward Pool and Associates, a joint venture (or partnership) of the four individual taxpayers, and the profits therefrom were therefore earned by and includible in the 1947 and 1948 incomes of the four individual taxpayers.



(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

\* \* \*

\* \* \* \*

(26 U.S.C. 1952 ed., Sec. 22.)

## SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*.—As used in this chapter—

(1) [as amended by Sec. 115(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital assets*.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section

23(1) \* \* \* or real property used in the trade or business of the taxpayer.

\* \* \* \*

(j) [as added by Sec. 151 (b) of the Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion \* \* \* of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales

or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. \* \* \*

\* \* \* \*

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.117-1. *Meaning of Terms.*— \* \* \*

The exclusion from the term "capital assets" of \* \* \* real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. \* \* \*

\* \* \* \*

### STATEMENT

The Tax Court's findings of fact (R. 33-70) include stipulated facts (R. 33) and cover two issues. The findings bearing on the one issue which has been appealed may be restated as follows:

The taxpayers Edward Pool and Lottie Pool are husband and wife, as are the taxpayers William K. Murphy and Edna Murphy. Each couple filed their income tax returns on a cash basis and by calendar years. For the year 1948 each couple filed a joint return. (R. 33.)

Upon the organization in 1941 of Arcraft Builders, Inc. (hereinafter called Arcraft), for the purpose of engaging in residential building construction, tax-

payers Edward Pool and William K. Murphy each acquired shares of the Class B common stock of the corporation. The remaining shares of stock were owned by R. T. and Mary Cooke and J. S. A. and Gertrude C. Smith. Taxpayer Edward Pool had been a builder during all of his business life and was named president of Artcraft. Throughout his operations he had sold all of his houses through brokers, never having had a real estate broker's license or having sold any houses personally. Taxpayer William K. Murphy's employment with Artcraft was that of sales manager. (R. 34-35.)

During 1942 the major portion of Artcraft's income was derived from building houses for sale for its own account, although it did have some income from building contracts. In 1942 it built for sale on its own account and sold 142 houses in Los Angeles County. In 1943 it built for sale on its own account and sold 188 houses, all of which were likewise located in Los Angeles County. It derived no income in 1943 from building under contract for others. (R. 34-35.)

After the subject of building residential income units had been brought up and at first turned down and then held open for future consideration, Artcraft on February 24, 1943, made application to the Federal Housing Administration of the War Production Board to build for war housing 22 multiple dwelling structures, containing 68 family units, in Tract No. 11674 and on May 26, 1943, made application to build 70 duplexes, containing 140 units, in Tract 11451, both tracts being located near Long Beach and

the Douglas Aircraft plant. These projects were to be and were financed through F.H.A. Title VI loans with Western Federal Savings and Loan Association of California. As a part of its application in each instance, Arcraft agreed that it would hold for rent the accommodations contemplated at rentals per unit not in excess of monthly charges designated in the application, except as otherwise authorized by General Orders 60-2 and 60-3 of the National Housing Agency, and that it would not include in the lease of the accommodations any option to purchase except in accordance with the general orders; and, further, that, except as authorized by the general orders, it would not otherwise dispose of or enter into any agreement or contract for the disposal of any of the accommodations, or any title interest, and that it would notify any transferee of the accommodations that he must comply with the provision of the general order relative to occupancy. (R. 35-37.)

Arcraft's application, filed on February 23, 1943, for approval of the proposed construction of 22 multiple dwelling units on Tract 11674, was approved by the Federal Housing Administration on June 1, 1943, and by the War Production Board on June 7, 1943. The application, filed on May 26, 1943, for approval of the proposed construction of 70 duplexes on Tract No. 11451, was approved by the Federal Housing Administration on June 7, 1943, and by the War Production Board on June 16, 1943. (R. 38.)

General Orders 60-2 and 60-3 were part of the Operating Manual, National Housing Agency, General Order No. 60-2 being designated "Public Regu-

lations—Occupancy and Disposition of Private War Housing”, and General Order No. 60-3, as “Public Regulations—Methods of Disposition of Private War Housing Including Rent Levels, Sales Prices, and Petitions to the National Housing Agency”. (R. 38.)

General Order 60-2 recited that the National Housing Agency was responsible for the proper occupancy of housing programmed for war workers and for the adoption of regulations assuring that war housing would be held available for eligible war workers for the duration of the national emergency declared by the President on September 8, 1939. Under the order, private war housing was to be regarded as “begun” on the date of submitting to the Federal Housing Administration a properly executed application for priority assistance or authority to begin construction in connection with such housing, and the date of “completion” was to be the date upon which such housing was offered for initial rental or sale, or the date upon which it was first ready for immediate occupancy, whichever was later. The phrase “held for rental” included “only an ordinary landlord-tenant relationship or such a tenancy coupled with an option to purchase”. Under the option, the tenant was not to be obligated to purchase and the option was to run only in his behalf. The selling price was to “be a fair market price, or \$6,000”, whichever was lower. The option to purchase could not be exercised prior to the expiration of four months’ occupancy, and was to continue for at least 30 months, unless sooner exercised. Private war housing begun on or after February 10, 1943,

was to be made available for initial occupancy, and for reoccupancy, only by eligible war workers. It was provided, however, that at any time subsequent to 60 days after completion of such housing, the owner might petition the National Housing Agency to permit initial occupancy, or reoccupancy, as the case might be, by a person other than an eligible war worker. Except for involuntary transfers, private war housing could be disposed of (a) only to an occupant, after four months' occupancy; (b) to a person who would not himself occupy the housing, provided the occupancy and disposition limitations applicable prior to purchase or acquisition should continue to be applicable after such purchase or acquisition; or (c) at any time subsequent to 60 days after completion of any such housing, the owner might petition the National Housing Agency to permit disposition otherwise than as indicated in (a) and (b). (R. 38-40.)

General Order 60-3 was designed to implement the occupancy and disposition policies of the National Housing Agency applicable to all private war housing as stated in General Order No. 60-2. It also provided that for the duration of the national emergency declared by the President on September 8, 1939, all private war housing begun on or after February 10, 1943, should be held for rental to eligible war workers as provided in General Order No. 60-2, at the rentals specified in the application, which rentals should in no event exceed \$50 per month shelter rent for one unfurnished dwelling unit, plus a reasonable charge for tenant services, which was

not to exceed \$3 per month per room. It also carried provision that "a dwelling unit \* \* \* may be purchased by an occupant \* \* \* after four months of continuous occupancy", but that the purchase price might not exceed the fair market price, or \$6,000, whichever was lower. In the case of such sale, the seller was required to submit an agreement on the part of the purchaser that such purchaser would continue to occupy the dwelling unit, or would hold the unit subject to the occupancy and disposition provisions set forth in General Order No. 60-2. Subject to the same restrictions as to price, such houses could also be transferred to a person who would not become an occupant thereof, but only if an agreement was submitted stating that the housing would be held subject to the provisions of General Order No. 60-2. Further, at any time subsequent to 60 days after completion, the original owner or a subsequent owner might petition the National Housing Agency to permit disposition otherwise than as provided above. (R. 40-41.)

General Order No. 60-3 was thereafter superseded by General Orders Nos. 60-3A, 60-3B, which became effective August 25, 1943, and 60-3C, which became effective November 12, 1943. So far as appears, the superseding orders were, for the purposes here, substantially the same as General Order No. 60-3. (R. 41.)

On June 1, 1943, after additional shares of Aircraft Class B common stock had been authorized and issued to taxpayers Edward Pool and William K. Murphy and to the Smiths and Cookes, taxpayers



purchased all of the stock held by the Smiths and Cookes. On June 8, 1943, Smith and Cooke resigned as officers and directors of the corporation. At all times thereafter, taxpayers (Edward Pool and William K. Murphy and their wives) were the sole stockholders of Artcraft. (R. 37-38.)

At a special meeting of Artcraft's board of directors held on September 16, 1943, the corporation, pursuant to taxpayers' desire, agreed to turn over to the four taxpayers, as tenants in common, the 22 lots in Tract 11674 and the 70 lots in Tract 11451, together with all buildings erected thereon, and that money obtained from loans over and above the actual cost of the buildings should also be transferred to them as tenants in common, in consideration for which the corporation was to retain all rentals and payments received upon any of the buildings until the time the property was transferred to taxpayers. Taxpayers were not to assume any personal responsibility but agreed that, so long as rentals or sales of the properties produced sufficient funds, such funds would be used to liquidate encumbrances upon the properties. The actual transfer of the properties was made later, pursuant to a special meeting of Artcraft's board of directors held on March 31, 1944, the date on which all of the buildings on Tracts 11674 and 11451 were completed. (R. 41-43, 44-46.)

Generally speaking, the dwelling units on Tracts 11674 and 11451 were rented as construction was completed. The first unit to be rented was in one of the 22 apartment buildings on Tract 11674. It was rented on the day before Thanksgiving in 1943.

The terms and conditions under which the housing was rented, including rental rates, were in keeping with the requirements of General Orders Nos. 60-2 and 60-3. The initial leases were for a period of one year. A few of the apartments may thereafter have been leased for longer periods. (R. 44.)

On or about April 1, 1944, taxpayers "formed a joint venture (or partnership) known as Edward Pool and Associates" (hereinafter called Associates), which was formed for the purpose of holding and dealing with the properties which had been transferred by Artcraft to taxpayers. Associates kept its books under an accrual method of accounting and on the basis of a fiscal year ending January 31. It filed partnership returns of income, Form 1065, for the fiscal years ended January 31, 1945, through January 31, 1950, inclusive. It maintained no office as its own and did not purport to have any employees. Its books and accounts were kept by a Mrs. Woodruff, who was carried as an employee of Artcraft, no part of her salary being charged as such to Associates. (R. 46-47, 55.)

At some time prior to June 14, 1944, Pool and Murphy began the construction of a market building on a lot owned by them and their wives in Long Beach. The actual construction work was done for them by Artcraft. There was no written contract or agreement with respect to the work Artcraft was doing, but at a special meeting of Artcraft's board of directors on June 14, 1944, after Pool had recited that Artcraft was doing the work for the individuals named "upon a basis of cost plus 10%", a motion

was made, and carried, that the contract for construction of the market building in the terms stated be ratified, confirmed and approved. The completed cost of the market building to the four individuals was \$51,409.95. At all times since its completion, the building has been rented, and at the time of the trial herein was still owned by the four individuals. (R. 47.)

Under date of January 4, 1945, Artcraft made a priorities application to the National Housing Agency of the Federal Housing Administration for the construction of 100 duplexes on Tract No. 13163 in Long Beach. As in the case of the construction heretofore described on Tracts 11674 and 11451, Artcraft, as a part of its application, represented that it would hold the proposed accommodations for rent and would rent them only to eligible war workers as defined in the National Housing Agency's General Order No. 60-1, and that any sales thereof would be only as permitted by National Housing General Orders Nos. 60-2 and 60-3; and further, that rents and other charges to tenants would not be in excess of the amounts thereafter shown in the application, which schedule indicated a charge of \$42.50 as shelter rent and \$7.75 as a charge for services, making a total charge of \$50.25 per month. In making the application, Artcraft represented itself as the project owner. The application was approved under date of February 5, 1945. This project was financed through F. H. A. insured loans from Western Federal Savings and Loan Association aggregating \$724,685. (R. 47-48.)

As in the case of the lots and buildings on Tracts 11674 and 11451, Artcraft, at a special meeting of its board of directors held on February 26, 1945, agreed to transfer the 100 lots in Tract 13163, together with any and all buildings and improvements erected thereon, to taxpayers as tenants in common. The transfer was made by deed dated March 21, 1946, pursuant to resolution adopted at a regular meeting of Artcraft's board of directors held on February 1, 1946, after all of the buildings and improvements (the 100 duplexes) had been completed. (For details of the agreement and execution thereof, see R. 48-52.)

Only Tracts 11451 and 13163 are directly involved here. Tract 11451 with the improvements cost Artcraft \$477,947.74 and it was at that amount that the property was transferred by Artcraft to the four taxpayer-stockholders. Artcraft had received F.H.A. insured loans on the tract, through Western Federal Savings and Loan Association, of \$525,000. The difference between the \$525,000 and the \$477,947.74, amounting to \$48,052.26, was made available by credit entries to Associates. Tract 13163 with improvements was transferred by Artcraft to the taxpayer-stockholders at its cost of \$624,220.02 and the excess of F.H.A. insured loans on the tract, amounting to \$100,464.98, was transferred to taxpayers by credit entries. (Stip. pars. 15, 16, 20, R. 22-23, 25-27.)

The 100 duplexes on Tract 13163 were leased as they were completed, all of the leases being for a

period of one year. The dates of completion were in June, July and August of 1945. (R. 54.)

From time to time, a tenant would inquire as to whether the housing occupied by him under the lease might be purchased. None of the leases carried a purchase option provision, however, and the tenant was advised that the houses were not for sale. The same response was given to non-tenants making similar inquiries on various occasions. (R. 54.)

After the transfer of title to the 22 apartment buildings and the 70 duplexes by Arcraft to the taxpayer-stockholders in 1944, and the similar transfer of title to the 100 duplexes in 1946, the rental of the apartments and duplexes was continued from Arcraft's office and in Arcraft's name. Mrs. Woodruff, who did Arcraft's bookkeeping and also kept Associates' books, handled the transfer of rentals to taxpayers. Associates paid Arcraft for services performed as "rental agent". (R. 55-56.)

Effective October 15, 1945, "sales ceilings on all priority assisted housing" were removed, but "OPA controls over rental remained". At some time in 1945 or early 1946, an application was made by Associates and/or Arcraft for permission to increase the rents being charged on the apartments and duplexes, but the application was denied. As to the 170 duplexes, and upon advise of counsel, a practice was later adopted of not renewing leases when they expired. Thereafter a tenant, upon expiration of his lease, would continue in the premises under a month-to-month tenure. The date of the last of the written leases on any of the 100 duplexes on Tract 13163 was April 10, 1946. (R. 54.)

After the lifting of the ceiling on the sale prices for war housing in October of 1945, and as veterans returned and began looking for homes, a very substantial upward trend, particularly in 1946, became noticeable in the selling prices such housing was commanding. (R. 57.)

At some time in January or February of 1946, Philip Boland, who throughout his business life had been engaged in some activity as a real estate broker, was on terminal leave from the Air Force. During that period he was visiting "different people" he knew, among them Pool and Murphy, who showed him the properties they had constructed and then owned. Boland, casually but not seriously, because he did not know where he would locate, suggested that Pool and Murphy permit him to sell the properties for them. The proposal was not accepted. At some time in April of 1946, Boland approached Pool and Murphy in a serious effort to induce them to permit him to sell the apartment buildings and the 170 duplexes. He argued that the then present was the best time to cash in on property, that everybody wanted to buy but there was nothing to sell, and that the demand was great for any kind of living quarters. Murphy saw it his way, and it was not until later that Pool "more or less reluctantly" agreed to go ahead and sell some of the units,<sup>3</sup> the units then

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<sup>3</sup> It was Pool's testimony that Murphy got rather enthusiastic as the prices went up, but that he, Pool, still did not want to sell them. He also testified, "We got so much advice from Mr. Boland, Mr. Boland was so persistent on what they could do, the prices he could get, and naturally there

agreed upon being 70 duplexes on Tract 11451. For his services, Boland at first sought the "straight five per cent commission" which was "more or less traditional" in that area. After some discussion, an agreement was reached that the taxpayers would supply the office facilities, including telephone and some secretarial and office help, and that Boland should be compensated at the rate of \$500 for each building sold. (R. 57-58.)

In the course of his negotiations with Pool and Murphy for permission to sell the duplexes, Boland visited the Los Angeles offices of the Bureau of Internal Revenue and was referred to various rulings and regulations dealing with the sale of the property. He had at one time been an employee of the Bureau. After reading the rulings and regulations, he advised Murphy that in his opinion the gains realized upon the sale of the properties would be capital gains. (R. 58.)

On some undisclosed date, but after December 31, 1945, the certified public accountant who looked after the books of Artcraft and of Associates had undertaken to convince Pool and Murphy that they should sell the duplexes and possibly the apartment buildings. Pointing out that they were restricted in the receipt of rental income by rent control, and stating that in his opinion the prevailing prices for such property were at a peak and would not be as favorable thereafter, he argued that the sales proceeds could be put into more favorable income-producing prop-

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was quite a profit on them, and they just finally overrode me, that's all". (R. 58.)

erties. And while the figures disclosed a rather substantial rental income, he made some tabulations which were designed to show that if depreciation should be computed on the current selling prices for such housing, instead of cost, no profit from rental would be reflected. On or about the first of May 1946, Murphy inquired as to whether the gains upon sale of the properties would receive capital gains treatment. He was taken by the accountant to his senior in the firm, who advised Murphy that the gains would be taxable as capital gains. (R. 58-59.)

Boland conducted his selling activities in and from the offices maintained under Artcraft's name, and was assisted in the office and paper work by Mrs. Woodruff. He had no sales assistance in selling the 70 duplexes on Tract 11451 but at one time did employ a girl for work in the office. She was compensated by Boland on his own account. Mrs. Woodruff continued to be paid as an employee of Artcraft and received no compensation from Boland. In selling the 70 duplexes, signs were at first placed in front of buildings which had vacancies in them. After a short time, this practice was abandoned, to the end that people would then come to the office, from which Boland would send them to the places which were vacant, advising them that if they wanted the property, to come back and "we will do business here". (R. 59-60.)

Boland wrote the copy for and placed and paid for the advertising in the papers of the area. The duplexes were advertised as having been built by Artcraft and as being for sale by the builder. They were



advertised for sale at \$11,800 per duplex. Representation was made that "rent of one apartment" would carry "payments on the building". There was no offering, and no sales were made, of any of the 70 duplexes on the basis of single living units; in other words, there was only one buyer for each duplex. (R. 60.)

The first deposit on a property was taken on May 4, 1946, and in approximately ten weeks' time sales had been closed or deposits had been taken on all 70 of the duplexes. So far as appears, the first closing was on June 22, 1946, and the last on September 6, 1946. The date of closing on one sale is not shown, but the deposit in that instance was made on May 6, and the deed was dated May 28. (R. 60.)

After concluding his selling activities in respect of the 70 duplexes on Tract 11451, Boland took a trip back to his home in Missouri. He returned to the Long Beach area about the middle of July and shortly thereafter reached an agreement with Pool and Murphy for the sale of the 100 duplexes on Tract 13163, which apparently was in all material respects the same as that under which the 70 duplexes had been sold. At or about that time, the selling of such housing was made easier due to the fact that through so-called GI loans a veteran could borrow the full price of a property and make a cash purchase without having on his own account to make a down payment. (R. 60-61.)

While in the selling of the 70 duplexes each duplex had been sold to a single purchaser, the advertising of the 100 duplexes suggested two purchasers per

building, and most of them were so sold. In so making these sales, it was assumed that the Bank of America would do the financing, as it had done in respect of the 70 duplexes. But when application was made for financing the sale of a duplex to two veterans, each to own one-half of the building, the bank declined and the completion of the sales of the duplexes on Tract 13163 had to be delayed until the necessary financing could be arranged. Murphy set about the job of arranging the financing, and was so occupied for a period of several weeks. He "finally arranged for it in the East", and most of the sales were thereafter financed by the Massachusetts Mutual Life Insurance Company. Deposits were taken on 20 duplexes in August, the first shown as having been made on August 12. The date of the first deed was September 23, six being shown for that date. (R. 61.)

As in the case of the 70 duplexes on Tract 11451, the 100 duplexes were advertised as having been built by Artcraft and as being for sale by the builder. In one instance the representation was, "It's The Builder That's Selling Them!" The price advertised was \$13,000 per duplex. (R. 61-62.)

The selling operation was conducted in substantially the same manner as in the case of the 70 duplexes, except that Boland, for part of the time at least, employed two salesmen to assist him. As before, the selling was done from the Artcraft office, and he was assisted in the office and paper work by Mrs. Woodruff. Boland paid the salesmen, but Mrs. Woodruff received her pay as an employee of Artcraft. (R. 62.)

The selling of the 100 duplexes extended through the remainder of 1946 and into 1947. The first closing was on October 23, 1946, and by the end of July 1947, 99 of the transactions had been closed, three being closed in the latter month. (R. 62.)

Sales of the duplexes would have been facilitated by the existence of vacancies. Due to rent control, however, it was still not possible to have the properties vacated preparatory to sale and in connection with the selling operations the creation of vacancies was encouraged. When the selling of the 70 duplexes on Tract 11451 began, only two units were vacant, but in the course of the selling operations the number increased to thirteen. With respect to the 100 duplexes on Tract 13163, at least 22 units were vacant or became so by the time the sales were concluded. The percentage of tenants who became purchasers was comparatively quite low. (R. 62.)

In selling the 70 duplexes on Tract 11451, and by months, the deposits were taken, escrow was started, deeds were executed and the transactions were closed (R. 62-63), as follows (R. 63) :

1946	Deposits Taken	Escrow Started	Deeds Executed	Trans- actions Closed
May .....	55	11	8	---
June .....	8	40	37	19
July .....	5	12	18	38
August .....	---	4	7	10
September .....	---	---	---	1
October .....	---	1	---	1
	—	—	—	—
	*68	**68	70	***69

\* Two dates of deposit are not shown.

\*\* Two dates escrow started also are not shown.

\*\*\* One date of closing is not shown.

In selling 99 of the 100 duplexes on Tract 13163, and by months, the deposits were taken, escrow was started, deeds were executed and the transactions were closed, as follows (R. 63):

	Deposits Taken	Escrow Started	Deeds Executed	Trans- actions Closed
1946				
August .....	20	15	---	---
September .....	27	7	13	---
October .....	17	25	28	24
November .....	14	16	20	11
December .....	5	14	13	17
1947				
January .....	2	11	13	13
February .....	1	2	3	18
March .....	5	1	2	6
April .....	1	3	2	2
May .....	---	2	2	2
June .....	1	2	3	3
July .....	---	---	---	3
	---	---	---	---
	*93	**98	99	99

\* Six dates of deposit are not shown.

\*\* One date escrow started also is not shown.

The 70 duplexes on Tract 11451 were sold for a total of \$828,400, 64 being sold at \$11,800 per building and 6 at \$12,200 per building. The expenses of sale were \$45,316.40 and the depreciation, which had been claimed by Associates in its return of income and, so far as appears, had been allowed by the Commissioner, was \$52,588.94. (R. 64.)

The 65 duplexes on Tract 13163 sold by Associates in its fiscal year ended January 31, 1947, were sold for a total of \$846,250, 60 being sold at \$13,000 per building and 5 at \$13,250 per building. The selling costs amounted to \$42,447.80. The depreciation

claimed by Associates as allowed or allowable on the 65 buildings in its return of income for the fiscal year was \$15,314.26. The 34 duplexes on Tract 13163 sold by Associates in the fiscal year ended January 31, 1948, were sold for a total of \$442,750, 31 being sold at \$13,000 per building and three at \$13,250 per building. The selling costs amounted to \$23,753.14, and the allowed or allowable depreciation on the 34 duplexes, as shown by Associates on its return for the fiscal year ended January 31, 1948, was \$10,592.01. (R. 64.)

On its return of income for the fiscal year ended January 31, 1947, Associates reported gain of \$336,947.98 from the sale of the 70 duplexes on Tract 11451 and \$413,372.46 from the sale of 65 duplexes on Tract 13163. It reported a loss of \$465.18 on some showcases, and a net gain from the sale of the duplexes of \$749,856.26, of which it reported \$374,928.13 as the amount of taxable net long-term capital gain distributable to the partners. On its return of income for its fiscal year ended January 31, 1948, it reported a gain on the sale of 34 duplexes on Tract 13163 of \$217,354.06 and a loss on the sale of building fixtures retired of \$1,537.60, or a net gain from the sale of the properties of \$215,816.46, of which amount \$107,908.23 was shown as the amount of taxable net long-term capital gain. (R. 64-65.)

Each of the taxpayers reported on their returns for 1947, and as long-term capital gain, one-fourth of the amount which had been reported by Associates on its return of income for its fiscal year ended January 31, 1947, as net taxable long-term capital

gain, and on their returns for 1948, one-fourth of the amount similarly shown by Associates on its return of income for the fiscal year ended January 31, 1948. (R. 65.)

For the fiscal years ended January 31, 1945, 1946, 1947 and 1948, Associates realized net rentals from the market building, from the apartment buildings on Tract 11674, from the duplexes on Tract 11451, and from the duplexes on Tract 13163 (R. 65), as follows (R. 66):

Year ended	Market Building	Tract 11674 22 Multiples	Tract 11451 70 duplexes	Tract 13163 100 duplexes	Total Income
1945	\$ 2,235.17	\$ 4,533.55	\$ 9,274.23	-----	\$16,042.95
1946	15,994.60	8,399.10	11,356.05	-----	35,749.75
1947	19,567.18	6,997.97	(3,886.13)	\$21,597.29	44,276.31
1948	16,008.70	(2,131.51)	-----	(2,491.07)	11,386.12
	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>
	\$53,805.65	\$17,799.11	\$16,744.15	\$19,106.22	\$107,455.13

In 1948 Arcraft built for Pool and Murphy a business building, referred to as the bank building, on land owned by them individually. This property was sold in 1952 through a real estate broker, purportedly to avoid possible foreclosure. The fee, if any, paid by Pool and Murphy to Arcraft for constructing the building does not appear. (R. 66.)

In 1949 arrangements were made with a real estate broker to sell the 22 apartment houses on Tract 11674, and they were sold during the fiscal years 1949 and 1950 for a total profit of \$112,414.62. Sale of the one remaining duplex on Tract 13163 was completed on February 28, 1949. (R. 66-67.)

In 1950 Pool and Murphy, in association with Major General Patrick Hurley, formed a corporation in New Mexico, the three individuals being the sole stockholders. The business of the corporation was the building and selling of single-family houses. In 1951 it built and sold 98 such houses. The houses were sold through brokers. Pool was president and Murphy was secretary-treasurer of the corporation, and their duties were the same as their duties had been with Artcraft. Pool and Murphy each received a salary of \$500 per week. (R. 67.)

In 1951 the same three individuals organized a corporation in Colorado. Its business was the same as that of the New Mexico corporation. At the time of the trial herein, it had built 192 houses for sale and they were in the process of being sold. The positions held with the corporation and the duties performed by Pool and Murphy were the same as those with the New Mexico corporation. From the Colorado corporation, each of them received a salary of \$750 per week. (R. 67.)

Beginning with the employment of Boland, taxpayers began a business of selling real estate, and from April 1946 the 70 duplexes on Tract 11451, and from July 1946 the 100 duplexes on Tract 13163 were held by them primarily for sale to customers in the ordinary course of that business. (R. 70.)

The Tax Court concluded that the duplexes on Tracts 11451 and 13163 were held by taxpayers primarily for sale to customers in the ordinary course of their business and were sold to customers in the ordinary course of that business. (R. 82.) Accord-

ingly, the Tax Court held that the gain realized from sales of duplexes in the taxable years is taxable as ordinary income, rather than as capital gain under 1939 Code Section 117. (R. 80-88.)

### SUMMARY OF ARGUMENT

Taxpayers are taxable in 1947 and 1948 on their profit from the sales in 1946 and 1947 of the 70 duplexes in Tract 11451 and 99 of the 100 duplexes in Tract 13163 which had been previously distributed to them by their wholly owned corporation, Artcraft, and were held and sold by Associates, their partnership or joint venture. As the Tax Court held, their profits from the sales are taxable as ordinary income, rather than as capital gain under Section 117.

Section 117 excludes from its operation property held primarily for sale to customers in the ordinary course of a taxpayer's trade or business. The Tax Court held that from April 1946 the 70 duplexes in Tract 11451, and from July 1946 the 100 duplexes in Tract 13163, were held by taxpayers primarily for sale to customers in the ordinary course of their business. As this Court has frequently held, such findings are to be sustained unless they are clearly erroneous. Taxpayers contend that the Tax Court's decision may also be reviewed for error of law but they fail to show wherein the Tax Court adopted an erroneous view of the law.

The Tax Court's findings are amply supported by the evidence. While the duplexes were at first rented, a decision to sell them was made and from that time on (April 1946 as to the 70 duplexes in Tract 11451



and July 1946 as to the 100 duplexes in Tract 13163) they were held primarily for sale. They were sold in such a manner as to constitute a real estate business, rather than the mere liquidation of an investment. A very aggressive and active sales campaign was conducted and the sales were frequent, continuous and substantial. As the Tax Court stated, all of the normal activities which might reasonably be expected in the conduct of an active real estate selling operation were indulged in and, all things considered, it would be difficult to imagine a selling operation or business which was more actively conducted and carried on than the one here. The business was that of taxpayers, not of the real estate agent Boland whom taxpayers employed to do the selling. He had authority to sell only at a fixed price and was to receive \$500 for each building he sold. The deeds used in the sales were drawn up by Associates' attorney or at his direction. Taxpayers furnished Boland with an office and office help. His selling activities were conducted from the office of Arcraft, located in the center of Tract 11451, and Arcraft had since 1944 been acting for Associates. Most of the office and paper work was done by Mrs. Woodruff, who was the bookkeeper for both Arcraft and Associates and was paid by Arcraft. The duplexes were advertised as for sale by Arcraft with at times a representation that they were for sale by the builder, including the representation "It's the Builder That's Selling Them!" When difficulties were encountered with respect to the financing of the duplexes on Tract 13163 for prospective purchasers, taxpayer

Murphy himself personally handled the financing arrangements and spent several weeks on it. According to its income tax returns, Associates paid expenses of sale of over \$27,000 more than it paid to Boland, whose only expenses were for advertising (\$2,500) and for a girl he at one time employed. Taxpayers did not themselves act as salesmen but that was because they were paying Boland to do the selling.

In brief, the duplexes were held for sale and sold in the course of a real estate business which was represented to be that of Artcraft, taxpayers' wholly owned corporation, but was in fact that of Associates, their partnership or joint venture. Clearly, contrary to taxpayers' contention, this is not a case where property was just turned over to a real estate broker to liquidate in the course of his own business and at his own expense. In using a real estate broker, taxpayers conducted a real estate business with respect to these duplexes in the same manner that their wholly owned corporation, Artcraft, had previously conducted a real estate business and in the same manner which two corporations they formed together with General Hurley, to build and sell houses in New Mexico and Colorado, subsequently conducted a real estate business.

## ARGUMENT

THE TAX COURT DID NOT ERR IN CONCLUDING THAT THE DUPLEXES ON TRACTS 11451 AND 13163 WERE HELD BY TAXPAYERS PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF THEIR BUSINESS AND, ACCORDINGLY, THAT THE PROFITS REALIZED FROM THE SALE THEREOF ARE TAXABLE AS ORDINARY INCOME RATHER THAN AS CAPITAL GAIN UNDER 1939 CODE SECTION 117

Taxpayers were the members of a joint venture or partnership, called Associates, which they formed for the purpose of holding and dealing with the properties which were distributed to them by their wholly owned corporation, Artcraft. (R. 46-47.) Such property included the 70 duplexes on Tract 11451 and the 100 duplexes on Tract 13163. (R. 44-46, 48-52.) The 70 duplexes on Tract 11451 were sold in 1946 (R. 60) and 99 of the 100 duplexes on Tract 13163 were sold in 1946 and 1947 (R. 62). Since Associates reported its income on the basis of a fiscal year ending on January 31 (R. 47), taxpayers are taxable in 1947 and 1948 on the profits from the sales of the duplexes in 1946 and 1947. They contend that their profits from the sales are taxable as capital gain under Section 117 of the Internal Revenue Code of 1939, *supra*, which, however, excludes from its operation "property held \* \* \* primarily for sale to customers in the ordinary course of" their "trade or business".

A. The "clearly erroneous" rule is applicable in respect of the scope of review

The Tax Court found as facts (R. 70) that "Beginning with the employment of Boland", taxpayers "began a business of selling real estate" and that—

from April 1946 the 70 duplexes on Tract 11451, and from July 1946 the 100 duplexes on Tract 13163 were held by them primarily for sale to customers in the ordinary course of that business.

As this Court has repeatedly held, such findings are to be sustained unless they are clearly erroneous. *Pacific Homes v. United States*, 230 F. 2d 755; *Cohn v. Commissioner*, 226 F. 2d 22; *Stockton Harbor Indus. Co. v. Commissioner*, 216 F. 2d 638, 640, 650, certiorari denied, 349 U.S. 904; *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263; *Rubino v. Commissioner*, 186 F. 2d 304, certiorari denied, 342 U.S. 814; cf. *Homann v. Commissioner*, 230 F. 2d 671.

Taxpayers nevertheless make an argument (Br. 23-27) directed, apparently, toward showing that the Tax Court's decision is reviewable "free of the 'clearly erroneous' rule" (Br. 26). Reliance is placed upon decisions (see, e.g., *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217, 219 (C.A. 5th)) which, although recognizing the applicability of the "clearly erroneous" rule, have also stated that the rule has no restraining impact *insofar as* the ultimate fact is simply the result reached by processes of *legal* reasoning or the interpretation of the *legal* significance of the facts. Presumably, any Tax Court decision may be reviewed free of the "clearly erroneous" rule if the decision is based upon an erroneous view of the law.

However, contrary to the implication of taxpayers' argument, this is not a case where the Tax Court adopted an erroneous view of the law. Such legal arguments as taxpayers make are specious. They argue that the Tax Court failed to attach proper importance to their investment purpose in acquiring the properties (Br. 29-30) but, since the Tax Court did consider their original purpose (R. 82-83), the argument goes to the weight of the evidence and is therefore factual. Taxpayers also refer to the "repudiated view" of the Tax Court that once a decision to sell is reached the property is *ipso facto* held for sale in the ordinary course of business (Br. 28) but the Tax Court took no such view. It held that the manner in which property is liquidated *may* constitute a business (R. 84) and that on the facts presented in this case the sales of the duplexes *did* constitute a business (R. 85-87). Taxpayers also argue that a large number of sales in a short period of time does not establish a real estate business or sale of property in the ordinary course of business (Br. 46) but the Tax Court did not hold that they do. Similarly, contrary to taxpayers' assertion (Br. 48), the Tax Court did not hold that the use of an "independent real estate broker" is "irrelevant". What the Tax Court held is that the fact that sales are made by "a real estate broker" does not necessarily mean that the selling is not a business of the owners or that the sales are not made in the ordinary course of that business. (R. 84.)

**B. The evidence amply supports the Tax Court's finding that the duplexes were held primarily for sale to customers in the ordinary course of taxpayers' business**

From a factual standpoint, taxpayers' over-all argument seems to be that they originally acquired and held the duplexes for investment purposes and that in selling them they merely liquidated their investment by an activity which, if it constituted a business, was the business of an independent party, the real estate agent Boland. As we shall separately show below, however, (1) the duplexes were held primarily for sale, (2) the sales thereof were made in such a manner as to constitute a business of selling real estate, and (3) the business was that of taxpayers.

**1. *The duplexes were held by taxpayers primarily for sale***

Since taxpayers place great emphasis upon their alleged original investment purpose, it should be noted at the outset that it is by no means clear that the duplexes were even *originally* acquired and held by the four taxpayers, other than Pool, solely for investment purposes.<sup>4</sup> As to Murphy, as distinguished

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<sup>4</sup> It may also be noted that "investment" is somewhat of a misnomer here. The duplexes were built by Artercraft with F.H.A. insured mortgage loans which were in excess of the cost of the properties and the properties were subsequently distributed by Artercraft to taxpayers (R. 46, 52), who assumed no personal liability on the mortgage loans (R. 45, 51). The mortgage loans attached only to the properties and taxpayers' only obligation was to permit the necessary amount of rentals to be applied to the mortgages. (R. 45-46, 51-52.) As taxpayer Murphy testified (R. 288), "We had no funds invested, that is true".

from Pool, the Tax Court was persuaded that he had no purpose other than to rent *or* sell, depending upon which should prove more profitable (R. 82-83) and, as the Tax Court stated (R. 83), "the record is wholly silent" as to the original intent and purpose of the two wives.

But even if the duplexes had been *originally* held for investment by *all* of the taxpayers, it is sufficient that they were held primarily for *sale* prior to their actual sale. *Home Co. v. Commissioner*, 212 F. 2d 637 (C.A. 10th); *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217 (C.A. 5th). The tax Court found as facts that the 70 duplexes on Tract 11451 were held primarily for sale "from April 1946" and that the 100 duplexes on Tract 13163 were held primarily for sale "from July 1946" (R. 70), which in each instance was when the decision to sell was made and Boland was employed to sell the particular group of duplexes (R. 57-58, 60-61). Taxpayers impliedly concede the correctness of those findings by stating (Br. 45) that "once a decision to sell is made, the property is of necessity *held* for sale".

**2. *The duplexes were held for sale to customers in the ordinary course of business***

Since taxpayers claim that the sales of the duplexes merely constituted a liquidation of their investment, it should be noted, preliminarily, that this was no ordinary liquidation of an investment. In the first place, taxpayers had no "investment" to liquidate (see fn. 4, *supra*); they simply had acquired property, without any investment of their own, from which they could expect to profit through rental or

sale. Secondly, unlike many of the cases where the sale of property has been held to constitute the liquidation of an investment rather than a business,<sup>5</sup> taxpayers were under no compulsion, economic or otherwise, to liquidate their interest in Tracts 11451 and 13163. A liquidation of property connotes the absence of a motive to profit from sales (*Camp v. Murray*, 226 F. 2d 931 (C.A. 4th); *Goldberg v. Commissioner*, 223 F. 2d 709 (C.A. 5th)), whereas the very reason taxpayers decided to sell these duplexes was that they were persuaded that selling would be more profitable than renting. (See R. 57-58, 58-59, 86, 194-195, 204, 210, 232, 262-263.) Although the rental income was "a lovely setup" according to taxpayer Pool (R. 514), who was reluctant to sell, taxpayer Murphy became convinced that greater profits were to be derived from the marketing of the duplexes (R. 57-59, 86, 194-196), whose market value had practically doubled (R. 194-195), Pool was overridden, and the employment of Boland and marketing of the duplexes was the result (R. 86).

But even assuming that the sales of the duplexes may properly be classified as the liquidation of an investment, the liquidation of an investment may

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<sup>5</sup> *McGah v. Commissioner*, 210 F. 2d 769 (C.A. 9th) (liquidation because of bank's demand for payment of indebtedness); *Chandler v. United States*, 226 F. 2d 403 (C.A. 7th) (liquidation pursuant to abandonment of unsuccessful business enterprise); *Goldberg v. Commissioner*, 223 F. 2d 709 (C.A. 5th) (liquidation resulting from unprofitableness of rental business); *Greenspon v. Commissioner*, 229 F. 2d 947 (C.A. 8th) (liquidation in furtherance of severing business connection).



constitute a business, as taxpayers concede (Br. 55) with the citation of a long list of decisions. And see *Magruder v. Realty Corp.*, 316 U.S. 69. The favorable capital gain treatment is lost if disposal of the investment property is made in the manner in which the business of selling property is ordinarily conducted. *Ehrman v. Commissioner*, 120 F. 2d 607 (C.A. 9th), certiorari denied, 314 U.S. 668; *Palos Verdes Corp. v. United States*, 201 F. 2d 256, 257 (C.A. 9th); *Goldberg v. Commissioner*, 223 F. 2d 709, 712 (C.A. 5th); *Home Co. v. Commissioner*, 212 F. 2d 637, 641 (C.A. 10th); *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217, 220 (C.A. 5th). And, of course, if the disposal of the property constitutes a business, "then certainly the sales \* \* \* were to 'customers' in the 'ordinary' course of that business". *Ehrman v. Commissioner*, *supra*, p. 610; see also, *Gruver v. Commissioner*, 142 F. 2d 363, 368 (C.A. 4th).

The Tax Court found that taxpayers' duplexes were held for sale in "a business of selling real estate" and were sold to customers in the ordinary course of that business. (R. 70.) There can hardly be any dispute as to the correctness of those findings.

When taxpayers decided to sell the duplexes, they employed Boland, a real estate broker (R. 372-373), to do the selling (R. 58, 60-61). They agreed to pay him \$500 a duplex as compensation and furnished him with office facilities, including a telephone and some secretarial and office help. (R. 58.) Boland conducted his selling activities in and from the office maintained under Artercraft's name (R. 59, 62), a large one-room

office located in the center of Tract 11451 (R. 198-199). He was assisted in the office and paper work by Mrs. Woodruff (R. 59), the bookkeeper for both Artcraft and Associates who was paid by Artcraft (R. 55), and Boland at one time even employed another girl to help out in the office (R. 59). A Veterans Administration valuation report was obtained. (Resp. Ex. XX, unprinted.) <sup>6</sup> The necessary arrangements were made for the financing of the sales on behalf of the customers. (R. 61.) "For sale" signs were at first placed in front of the duplexes in which there were vacancies but they were taken down because Boland found that his selling operations could more conveniently and effectively be accomplished by directing that prospective buyers come to the office. (R. 59-60, 399.) A very aggressive and active sales campaign was conducted. Advertising was regularly placed in the real estate section of all of the leading newspapers of the area (see R. 60, 61-62, 267, 270, 278-280, 319, 320-322; Resp. Exs. YY, ZZ, AAA, BBB, CCC, DDD, EEE and FFF, unprinted) and in at least three instances Boland was successful in having the properties discussed in a news item appearing in the real estate section of Los Angeles papers (Resp. Exs. ZZ, AAA, and FFF, unprinted). The sales of the duplexes were frequent, continuous and substantial. All told, \$2,117,400, (see R. 64), of which \$965,672.72 was reported as net profit (R. 64-65), was received

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<sup>6</sup> Pursuant to joint motion filed January 10, 1957, the exhibits are not included in the printed record. (R. 533-535.)

from 169 separate sales which as to the 70 duplexes on Tract 11451 occurred within a period of six months and as to 99 of the 100 duplexes on Tract 13163 occurred within a period of one year (R. 62-63). As the Tax Court stated in its opinion (R. 86, 87)—

In short, all of the usual and normal activities which might reasonably be expected in the conduct of an active real estate selling operation were indulged in.

\*     \*     \*     \*

All of the facts considered, it would be difficult to imagine a selling operation or business which was more actively conducted and carried on than the one here.

Accordingly, this case is favorably comparable to other cases where the selling activity was held to constitute a business rather than the mere liquidation of an investment, such as *Palos Verdes Corp. v. United States*, 201 F. 2d 256 (C.A. 9th); *Shearer v. Smyth*, 116 F. Supp. 230 (N.D. Cal.), affirmed *per curiam* for reasons stated in opinion of District Court, 221 F. 2d 478 (C.A. 9th); *Home Co. v. Commissioner*, 212 F. 2d 637 (C.A. 10th); *Galena Oaks Corp. v. Commissioner*, 218 F. 2d 217 (C.A. 5th), and *White v. Commissioner*, 172 F. 2d 629 (C.A. 5th). The disposal of the duplexes in the course of what so obviously amounted to a real estate business distinguishes this case from cases cited or relied upon by taxpayers, such as *McGah v. Commissioner*, 210 F. 2d 769 (C.A. 9th); *Smith v. Commissioner*, 232 F. 2d 142 (C.A. 5th); *Goldberg v. Commissioner*,

223 F. 2d 709 (C.A. 5th); *Victory Housing No. 2, Inc. v. Commissioner*, 205 F. 2d 371 (C.A. 10th).

**3. *The business was that of taxpayers, not Boland***

Taxpayers contend that the Tax Court erred in finding that it was *taxpayers'* business in which the sales of their duplexes were made. (Br. 47-53.) Their argument is that Boland, the real estate agent employed by them, was an "independent contractor" (Br. 47, 53) or "independent broker" (Br. 49) and that it was therefore his, rather than taxpayers', business in which the sales of the duplexes were made.

But, contrary to taxpayers' assumption (Br. 47, 49), we are not here concerned with the technical, common law concept of an "independent contractor". A real estate broker normally acts as the agent of others. Accordingly, in cases involving the question whether property was held primarily for sale to customers in the ordinary course of a taxpayer's business, the courts, including this Court, have repeatedly stated or held that a real estate business may be conducted by a taxpayer through others, such as a real estate broker. See *Richards v. Commissioner*, 81 F. 2d 369 (C.A. 9th); *Welch v. Solomon*, 99 F. 2d 41, 43 (C.A. 9th); *Commissioner v. Boeing*, 106 F. 2d 305, 309 (C.A. 9th), certiorari denied, 308 U.S. 619; *Homann v. Commissioner*, 230 F. 2d 671 (C.A. 9th); *Gruver v. Commissioner*, 142 F. 2d 363 (C.A. 4th); *Snell v. Commissioner*, 97 F. 2d 891, 892-893 (C.A. 5th); *Brown v. Commissioner*, 143 F. 2d 468 (C.A. 5th); *McFaddin v. Commissioner*, 148 F. 2d 570 (C.A. 5th); *Gambler v. Commissioner* (C.A.

5th), decided March 21, 1957 (1957 P-H, par. 72,-581). As this Court long ago stated in *Welch v. Solomon*, *supra*, p. 43—

The personal attention which a taxpayer gives to a business is certainly not decisive as to whether a resulting profit is ordinary income or capital gain. One may conduct a business through others, his agents, representatives, or employers. The business is nonetheless his because he chooses to let others bear all of the burdens of management.

There may be isolated instances where sales of a taxpayer's property are made through the efforts of a broker carried out independently of the taxpayer's business and conducted as a part of the broker's own business and at his own expense, but even *Smith v. Dunn*, 224 F. 2d 353 (C.A. 5th), where that was the situation, recognizes (p. 356) that the real estate business may be "conducted through a representative" by being carried on "primarily in behalf of the taxpayer".

The present case is one where the real estate business was conducted by a real estate agent primarily on behalf of taxpayers and was therefore taxpayers' business. Boland was a licensed real estate broker (R. 57, 372-373) but, so far as appears, he had no office in the Los Angeles area and was not even permanently located there. After getting out of the Air Force, he induced taxpayers to permit him to sell the duplexes, first the 70 in Tract 11451 and, when those were sold, the 100 in Tract 13163. (R. 57-58, 60-61.) For his services, he at first sought

the straight five per cent selling commission, which was "more or less traditional" in that area, but after some discussion taxpayers agreed to pay him \$500 for each building he sold and to supply the office facilities, including telephone and some secretarial and office help. (R. 58, 60-61.) The deeds used in the sale of the duplexes were drawn up by Associates' attorney or by someone else at his direction. (R. 502.) Boland's authority was to sell the duplexes at a fixed price. (R. 388.) He conducted his selling activities from the office of Artcraft (R. 59), taxpayers' wholly owned corporation which since 1944 had been acting for Associates (taxpayers' partnership or joint venture) (R. 446), which had no office of its own (R. 55, 294). The Artcraft office was a large one-room office located in the center of Tract 11451 (R. 198-199) and had the sign "Artcraft Builders, Inc." across the front and on the windows (R. 399). The duplexes were advertised as having been built by Artcraft and as being for sale by Artcraft (rather than by Boland), with at times specific representations that the duplexes were for sale by the builder, including a representation that "It's The Builder That's Selling Them!" (See R. 60, 61-62, 267, 270, 278-280, 319, 320-322; Resp. Exs. YY, ZZ, AAA, BBB, CCC, DDD, EEE and FFF.) Mrs. Woodruff, who kept both Artcraft's and Associates' books and was paid by Artcraft (R. 55, 294, 398, 453, 480), worked in the Artcraft office from which Boland conducted his selling activities (R. 398). She gave Boland "a great deal of help" (R. 393), as he testified, and rendered that help as part of the arrange-

ment with taxpayers. Indeed, it is rather obvious from the evidence that Mrs. Woodruff (paid by Artcraft, not Boland) did all of the office and paper work (see R. 393, 403-404, 424, 476-478, 491, 492-493, 498, 503, 511) except for such help as she had from a girl Boland at one time employed (R. 59). Boland testified that he did not pay much attention to details, which were to be taken care of by others—that his “job was to sell and keep them [the duplexes] sold”. (R. 423.) When difficulties were encountered with respect to the financing of the duplexes on Tract 13163 for prospective purchasers, taxpayer Murphy himself personally handled the financing arrangements and spent several weeks on it. (R. 87, 337-338, 389-390, 483.) At least one letter went out on Artcraft’s stationery signed by Boland as representing Artcraft. (Resp. Ex. GGG, unprinted.) According to its income tax returns, Associates paid a total of \$111,517.34 as expenses of the sale of the 169 duplexes sold in 1946 and 1947 (see R. 64), which was \$27,017.34 more than it paid to Boland. The only expenses Boland had were for advertising (\$2,500) and for the girl he at one time employed. (R. 385.) For part of the time he hired two salesmen to help him sell the 100 duplexes on Tract 13163 (R. 62) but the arrangement there was no doubt the customary one between real estate agents. Taxpayers Pool and Murphy did not themselves actively attempt to sell but taxpayer Murphy testified (R. 285) that “I did not intend to pay Boland, and I don’t think Mr. Pool did, \$85,000.00 for selling those

buildings and then turn around and do the work for him”.

In brief, therefore, the evidence shows that Boland's selling activity was conducted on behalf of taxpayers in a real estate business which was represented to be that of Artcraft (as distinguished from that of Boland) but was in reality that of Associates (taxpayers' partnership or joint venture). In using a real estate agent to do the selling, taxpayers (in partnership as Associates) conducted a real estate business, as related to these 170 duplexes, in the same manner that their wholly owned corporation (Artcraft) had previously conducted a real estate business (see Stip., par. 10, R. 19; R. 84-85, 145-146) and in the same manner that two corporations they formed together with General Hurley, to build and sell houses in New Mexico and Colorado, subsequently conducted a real estate business (see R. 67, 245, 506). The use of a real estate broker was “standard procedure” with Pool (R. 523), who had been in the real estate business in one form or another all of his life (R. 35). This simply is not a case where property was just turned over to a real estate broker to liquidate in the course of his own business and at his own expense. The evidence of the conduct of a real estate business with respect to these 170 duplexes is certainly as strong as, if not stronger, than the evidence in other cases where the business was held to be that of the taxpayer although the selling was done by a real estate broker. See *Homann v. Commissioner*, 230 F. 2d 671 (C.A. 9th); *Commissioner v. Boeing*, 106 F. 2d 305 (C.A. 9th), certiorari



denied, 308 U.S. 619; *Gambler v. Commissioner* (C.A. 5th), decided March 21, 1957 (1957 P-H, par. 72,-581); *Brown v. Commissioner*, 143 F. 2d 468 (C.A. 5th); *McFaddin v. Commissioner*, 148 F. 2d 570 (C.A. 5th); *Gruver v. Commissioner*, 142 F. 2d 363 (C.A. 4th).

### CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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MAY 1957.



No. 15399

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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EDWARD POOL and LOTTIE POOL, EDWARD POOL, LOTTIE  
POOL, WILLIAM K. MURPHY, EDNA MURPHY, WIL-  
LIAM K. MURPHY and EDNA MURPHY,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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On Petitions for Review of the Decisions of the Tax Court  
of the United States.

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## REPLY BRIEF FOR THE PETITIONERS.

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## REPLY BRIEF FOR THE PETITIONERS.

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### ARGUMENT.

The Commisisoner's Brief Does Not Meet the Issues  
Presented by This Appeal.

1. Several preliminary observations concerning the Commissioner's brief seem to be appropriate. Instead of dealing with the issues presented by this appeal and the serious arguments raised in our opening brief, the Commissioner's brief largely reasserts the Tax Court's disjointed marshaling of facts (both material and immaterial) as though this necessarily proved the validity of the Tax

Court's conclusion that these taxpayers were in the business of and were selling property to customers in the ordinary course of that business. All of this is done, as indeed the Tax Court did, without the slightest clue as to why a given fact is material to the application of the plain Congressional purpose expressed in Section 117(j) of the Internal Revenue Code of 1939.

The Commissioner's brief (p. 31) characterizes our legal arguments as "specious." Both such a broad side characterization of fully documented arguments neither sheds light on the important issues presented by this appeal, nor demonstrates, indeed, that the arguments are specious. Nor do we thing the validity of the Tax Court's analysis or its findings are established by the Commissioner's stating, as he repeatedly in effect does, that they are correct *because* the Tax Court said so.

Finally, we must call the Court's attention to the fact that the Commissioner's brief often cites cases for propositions that the cases do not support.

Without any attempt to deal with the Commissioner's arguments comprehensively, because to do so would unduly extend this reply, we will illustrate what we have been saying with a few important examples.

2. Our opening brief dealt at length with the proposition that a purpose of acquiring and holding property for "investment" until a decision to sell is made, is the first requirement for the applicability of Section 117(j) (Op. Br. pp. 27-35), because as this Court stated in



*Rollingwood Corp. v. Commissioner*, 190 F. 2d 263, 266-267, the purpose of the section is to give capital gain to "‘investment property’<sup>1</sup> as distinguished from ‘stock in trade’ or property *bought and sold* for a profit." (Italics supplied.)

We also pointed out that in the present case the Tax Court made no finding at all on this vital point (Op. Br. pp. 31-32) and that this Court reversed in *McGah v. Commissioner*, 193 F. 2d 662, *solely* because of a similar failure. The Tax Court did state in its opinion that Pool had an investment purpose (and presumably his wife did, too, since she had nothing to do with the business decisions); this the Commissioner concedes. (Comm's Br. p. 32.) But in our opening brief we set out in detail (pp. 35-45) and at length twenty different considerations which, on the basis of the undisputed record and evidence

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<sup>1</sup>The Commissioner's real or intentional misconception of this basic argument is illustrated by the statement that "investment" is a "misnomer" here (Comm's Br. p. 32, fn. 4; see also pp. 33-34) because Artcraft constructed the duplexes with borrowed money. But taxpayers received this property as a taxable dividend in kind from Artcraft, and therefore obtained a tax basis in the property. [R. pp. 23, 72.] Thus, even factually the Commissioner is wrong. But "investment," when used in connection with Section 117(j), does not refer to a monetary outlay, as the Commissioner either knows or should know. As this Court stated in *Rollingwood*, *supra*, page 267, footnote 5, "The word investment does not appear in the statute but is frequently referred to by the courts. \* \* \*" The reason that word is used as a synonym for the statutory language, as this and other courts have repeatedly stated, is that property acquired to produce income is afforded capital gain; while property *bought for the purpose of resale*—i. e., stock in trade, does not qualify for preferential taxation. The former is conveniently called an investment to distinguish it from the latter. Obviously, an "investment" does not become stock in trade even when one borrows the money to buy the property.

makes this case as strong as is possible and requires a finding that all the taxpayers *acquired* and *held* the property for investment—*i. e.*, for the production of income until it would be sold, as sooner or later occurs with all investments.

To answer this the Commissioner (Br. pp. 32-33) merely repeats the erroneous conclusion of the Tax Court, as proof of the very question raised by this appeal. But recognizing that this might not satisfy this Court, the Commissioner, apparently in the alternative, predicates his argument (Br. p. 33) on the assumption that the property was acquired as an investment by *all* the taxpayers.

Because the Tax Court found an investment purpose for Pool and perhaps his wife, yet taxed them the same as the Murphys, and since in any event the record requires the same conclusion as to the Murphys' Investment purpose, which the Commissioner made no attempt to rebut,<sup>2</sup> we think at this juncture of the case the Court must approach the case with the premise that all the parties had an original investment purpose.

3. The Commissioner argues (Br. p. 33) that, assuming the existence of a purpose of acquiring and holding for investment purpose, the Tax Court's ultimate conclusion that the property was held primarily for sale

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<sup>2</sup>Omitted also from the Commissioner's brief is any attempt to justify the Tax Court's arbitrary and capricious failure to give credence to Murphy's unimpeached, uncontradicted, straightforward and everywhere corroborated testimony. This error below, in itself, requires reversal of the Tax Court. *Grace Bros. v. Commissioner*, 173 F. 2d 170 (C. A. 9); *Chesapeake & Ohio Railway Company v. Martin*, 283 U. S. 209, 216, 217; *San Francisco Association for Blind v. Industrial Aid for the Blind, Inc.*, 152 F. 2d 532 536 (C. A. 8); *Foran v. Commissioner*, 165 F. 2d 705 (C. A. 5); *Ross v. Commissioner*, 227 F. 2d 265 (C. A. 5). See also *Herbert v. Riddell*, 103 Fed. Supp. 369, 388, 389.

is nevertheless correct because taxpayers impliedly concede the correctness of those findings when we stated (Br. p. 45) that “once a decision to sell is made the property is of necessity *held for sale*.”

But the language quoted by the Commissioner from our opening brief was immediately preceded by the statement (Op. Br. p. 45), “The purpose of Section 117(j) as previously emphasized<sup>3</sup> is to permit the *sale* of investment property.” The sentence quoted by the Commissioner was followed by the sentence (Op. Br. p. 45), “The statutory prohibition is not holding for sale but rather to *taxpayer’s* ‘customers’ in the ‘ordinary course’ of *his* business.”

The Commissioner’s position, as we read his brief, is that a taxpayer’s original purpose in acquiring and holding property as an investment is not relevant because, as soon as the taxpayer decides to sell it, this property is held for sale. This approach, of course, gives no meaning to the statute and has been repudiated time and again by the Courts of Appeals. (See our Op. Br. pp. 30-31.)

It is this erroneous view of the section that led the Tax Court to emphasize its finding that beginning with the employment of Boland the property was held for sale to customers [R. p. 70] and explains its failure to find anything at all about the original purpose of the acquisition of the property. This fundamental error illustrates, too, the point we stress, *supra*, that the Tax Court and the Commissioner merely emphasize some facts and omit others, without regard to the Congressional purpose or statutory standards which are a *sine qua non* to any intelligible application of Section 117(j) to a given set of facts.

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<sup>3</sup>Opening Brief, pages 28-32.

4. The Commissioner argues (Br. p. 34) that taxpayers do not qualify for Section 117(j) treatment because "taxpayers were under no compulsion, economic or otherwise, to liquidate their interest in Tracts 11451 and 13163." The brief continues that liquidation "connotes the absence of a motive to profit from sales \* \* \*" citing *Camp v. Murray*, 226 F. 2d 931 (C. A. 4), and *Goldberg v. Commissioner*, 223 F. 709 (C. A. 5). Neither case remotely supports this astounding proposition. The purpose of Section 117(j), in the words of this Court, is to "alleviate the burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect 'investment property' as distinguished from 'stock in trade,' or property bought and sold for a profit. \* \* \*" *Rollingwood v. Commissioner*, *supra*, pp. 266-267. It is manifest nonsense to say, as the Commissioner does, that if one is forced to liquidate or must sell at a loss, Section 117(j) applies, but if reasons exist which in taxpayer's business judgment make it desirable to liquidate an investment at a profit, then appreciation in value of the investment even over many years will be taxed in one year at graduated ordinary income rates which are often confiscatory. The statutory purpose was to prevent exactly this. Or, as the Court of Appeals for the Third Circuit stated only last year in *Curtis Company v. Commissioner*, 232 F. 2d 167, the sale of investment property to invest in something else "is precisely \* \* \* [the] sort of thing which prompted the passage of the capital gains provision. Capital gains were taxed at lower rates to relieve the taxpayer from 'excessive tax burdens on gains resulting from a conversion of capital investments.

and to remove the deterrent effect of those burdens on such conversions.' *Burnett v. Hormel*, 1932, 287 U. S. 103, 106 \* \* \*

To the same effect is *Corn Products Ref. Co. v. Commissioner*, 350 U. S. 44, 52.

But even if the courts had not passed on this point time and again, and even if the statutory purpose were less apparent, the proposition that liquidation of property connotes "the absence of a motive to profit from sales" (Comm's Br. p. 34), is patently contrary to the plain unambiguous meaning of liquidation which, of course, simply means to make liquid—*i. e.*, to convert to cash. One may liquidate because of pressure of creditors, or because the investment is unsatisfactory or, indeed, as here, to realize on the appreciation in value in order to make a different investment with the objective of securing more income. There could be hundreds of other reasons. If profits could not be realized on liquidation of investment, there would have been no need for Section 117(j).

5. The Commissioner correctly states our position that a liquidation of an investment can take place in such a way as to constitute a business. (Op. Br. p. 55; Comm's Br. p. 35.) But we do not "concede" this point, with its connotation that it is damaging to our position. On the contrary, we affirmatively assert this proposition because it is on this point that the Commissioner and the Tax Court confusedly marshal an odd assortment of facts to come to the conclusion that these taxpayers are not entitled to the remedial provisions of Section 117(j).

Thus, the Commissioner asserts (Br. p. 35) that "There can hardly be any dispute as to the correctness of \* \* \*

the finding that the duplexes were held for sale in "a 'business of selling real estate' and were sold

to customers in the ordinary course of that business.” We showed in our opening brief that there not only is a dispute but that there is no support for the finding that taxpayers’ contract with Boland placed them in the business of selling houses in the ordinary course of their trade or business. (Op. Br. pp. 44-55.) These arguments remain ignored. Instead, the Commissioner marshals two printed pages of alleged facts without once indicating why the particular facts support its ultimate conclusion. For example, the circumstance is repeatedly referred to, that the taxpayers agreed to furnish office facilities, including a telephone, and that Boland conducted his selling activities from the office which taxpayers owned located in the center of Tract 11451. (Comm’s Br. pp. 35-36.) As pointed out in our opening brief (pp. 50-51) Aircraft’s office was used because it was the only office space available in that area. Obviously, it was desirable to have the sales operations with some degree of proximity to the extensive properties being sold. The purpose of taxpayers and Boland alike was to dispose of the property efficiently and as rapidly as possible. The use of Aircraft’s office, for which suitable adjustment in the sales commission was made, was to the economic benefit of everyone concerned. But how did this put taxpayers in a new business of selling houses to customers? The absurdity of the Commissioner’s position is apparent when he seriously argues that this is a relevant fact in determining whether a tax deficiency in excess of half a million dollars is to be upheld.

The fact that Boland advertised the property and put up sales signs is consistent with the purpose for which he made his contract with taxpayers, which was, of course, to sell the houses. The record is very clear and the Tax

Court made no finding to the contrary, that the advertising was prepared by Boland and he paid for it. This is consistent with a business being conducted by Boland, but not by the taxpayers. The only sensible way in which the large quantity of investment duplexes could be sold was by having that fact brought to the attention of the public.

The frequency, continuity and substantiality of the sales which the Commissioner emphasizes (Comm's Br. p. 36) is a necessary corollary of having 170 buildings to sell. The cases have repeatedly held that the large investor is not to be discriminated against because of the size of his holdings. In our opening brief (p. 46) we cited *Curtis Company v. Commissioner, supra*, in which 1098 rental units were disposed of in the tax years; *Chandler v. United States*, 226 F. 2d 403 (C. A. 7), where 290,000 acres of land were disposed of in 536 separate transactions in eight tax years; and *Ross v. Commissioner*, 227 F. 2d 265 (C. A. 5), where the court said (p. 268) that the only significance of large numbers is that taxpayer "had a lot of houses to sell \* \* \*

It is significant, we believe, that these cases all involve reversals of the lower courts, all were decided subsequent to the decision below, and not one is deemed worthy of mention in the Commissioner's brief. Moreover, he filed no petition for certiorari in the Supreme Court.<sup>4</sup>

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<sup>4</sup>The Commissioner's failure to petition for writs of certiorari in these cases is highly significant. If, as the Commissioner asserts here, the ultimate question is one of fact (see point 9, *infra*), then, under the Government's view, the *Curtis* case, *supra*, for example, must have been erroneously decided for the facts there (which the Commissioner deems relevant) were stronger for his position than the facts here. And if the Commissioner's "fact question" approach is correct, the *Curtis* case would have been in

6. The Commissioner's argument that there was a business conducted by taxpayers in which they held property primarily for sale to customers (Comm's Br. pp. 32-38), necessarily overlaps his argument that the business was that of taxpayers, not Boland's. (Comm's Br. pp. 38-43.) And, indeed, under the latter heading we find the Commissioner again listing all of the facts asserted in the prior argument, and some additional facts, again with no explanation as to why they have relevance. We emphasized in our opening brief that in *Curtis Company* the Commissioner conceded in open court that had a broker there been employed, Section 117(j) would be applicable. Despite this admission where he thought it aided his case, here he argues the opposite in an attempt to win a case regardless of principle and regardless of merit.

Without shedding any light on the logical solution to the present controversy and for all that appears solely for the purpose of beclouding the issue, the Commissioner grudgingly states that although Boland was a licensed real estate broker (p. 39), "so far as appears, he had no office in the Los Angeles area and was not even permanently located there." While the record does not expressly state that he was permanently located here, the fact is that he was and still is. But the question we would like to ask is, what difference does it make whether he was or was not? Furthermore, what difference does it

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conflict with the decision of other circuits which the Commissioner cites here as supporting his approach. Consequently, the failure to ask for Supreme Court review, particularly where as in *Curtis* a much larger tax was involved than here, strongly suggests that the Commissioner saw no conflict in decisions and conceded that the Third Circuit was correct when it held that the Tax Court had committed reversible error in failing to apply Section 117(j). As we show, the same conclusion is *a fortiori* required here.



make that he tried to get 5 per cent commission but taxpayers agreed to pay him \$500 per house? (Comm's Br. p. 40.) What difference does it make if the deeds used in the sale of the duplexes were drawn up by the taxpayers' attorney? (Comm's Br. p. 40.) The deeds obviously had to be prepared by someone, and the owner of the property customarily has the deed prepared, because he is the one who executes it.

The controlling facts are that taxpayers entered into two separate contracts with Boland, first to sell the 70 duplexes and then the 100 duplexes, and except for the signing of the deeds and the incidental assistance of Murphy with respect to securing financing for the purchase of the 100 duplexes by customers, when he spent a few days with Boland helping to find a lender, taxpayers had nothing whatsoever to do with these sales. There are no reported cases in this field where the taxpayers exhibited less activity in selling than did these. If this constitutes the "everyday operation of a business" rather than the conversion of a capital investment which, at least until the decision to sell had been made, it clearly was, we think the standards of the statute are being ignored.

As the Supreme Court stated in its most recent pronouncement in the capital gain area, in *Corn Products Ref. Co.*, *supra*, "Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income. \* \* \* The preferential treatment \* \* \* applies to transactions in property which are not the normal source of business income." The court concluded, as this and other courts have constantly done, that Congress intended to relieve "excessive tax burdens on gains resulting from a conversion of capital investment. \* \* \*" We do not believe that,

on the present record, any conclusion is permissible except the conclusion that the taxpayers were not deriving income from the operation of a business.

7. We do not deny that frequency and continuity of sales, the amount of advertising, and various other factors are important criteria in proper situations. But the Commissioner, failing to comprehend why these standards are material in some cases and not in others, puts an irrelevant emphasis on these criteria in the present case.

There have been three types of cases in this general area in which a taxpayer is taxed with ordinary income, and properly so.

(1) In some cases, the question of original intention is obscure; in determining whether that intention was one of investment or sale, a court may properly look at the frequency and extent of *buying* and selling to determine whether the taxpayer was an investor or one who bought and sold in order to make a profit. Such cases in this court were *Rollingwood v. Commissioner, supra*; *Homann v. Commissioner*, 230 F. 2d 671; and *Cohn v. Commissioner*, 226 F. 2d 22.

(2) In some situations, although the original property had been acquired for use in the trade or business, or for an investment purpose, the taxpayer altered the character of the property in order to sell it at the highest possible price. Examples of such cases in this court are *Richards v. Commissioner*, 81 F. 2d 369, in which property used for truck farming was subdivided into residential lots, and improved by the construction of streets, gutters, and the bringing in of utilities such as gas, electricity and water. Although the taxpayer em-

ployed a broker, this court correctly found that taxpayer was not within the statute because the property which he was selling—the residential lots—was no longer property (farm land) used in the trade or business. *Ehrman v. Commissioner*, 120 F. 2d 607, (C. A. 9), was a similar case. Another case in this category in this court is *Commissioner v. Boeing*, 106 F. 2d 305, where the investment property had been timber lands, but the gain in question was derived from cutting timber and delivering the logs for sale. The property sold then was not the investment but property which the taxpayer had imparted additional values when the logs were cut and delivered in a salable form.

(3) The third category of situations and, admittedly, the one that gives the most difficulty in this field, is where there is an original investment purpose and there is a later decision to sell, but the sales are so frequent and continuous over so long a period of time and the activity of the taxpayer is so extensive that some courts have held that this, itself, constitutes a trade or business. We do not think we would be properly exercising our responsibility to this Court if we were to conclude that all in this field is black or white (as one might gather from the Commissioner's brief) because, as is frequent in the judicial process, particularly in the application of taxing statutes, a little gray often creeps in.

Conceivably, there can be situations where a taxpayer so busies himself in selling his property that he puts himself into a business of selling to customers. But since, as we have shown, Section 117(j) would be meaningless if it denied capital gain to a taxpayer who sold his investment as expeditiously as possible, it should take an extreme situation to warrant a conclusion that a taxpayer who is selling

his investment has become occupied with a business in doing so. Indeed, despite the fact that large amounts of property may be involved and despite extensive activity on the part of taxpayers in selling that property, the weight of authority holds that taxpayers are entitled to capital gain since otherwise the Congressional purpose expressed in Section 117(j) would be thwarted. Illustrative of this point are two cases decided only last year—*Curtis Company v. Commissioner*, 232 F. 2d 167, and *Chandler v. United States*, 226 F. 2d 403.

In the present case, we believe it is clear error to conclude, as the Tax Court did, that the taxpayers became engaged in a business once they decided to sell the property. We submit that the activities of these taxpayers were the very minimum possible to effect an orderly liquidation of the large number of duplexes which they own. The properties were disposed of in a short period of time, and with the minimum personal activity on their part. In short, this case is a typical situation in which Congress intended that the tax relief afforded by Section 117(j) should be applied.

It will be noted that the Commissioner, without any attempt at analysis, relies on authorities which deal with the first two categories of situations which we have mentioned. Those cases, quite obviously, do not support his conclusion that the present taxpayers, who had an original investment purpose and who did not attempt to change the character of the property, became engaged in a business merely by selling their investment property. Indeed, it is not amiss to observe that the Tax Court, like the Commissioner, has sometimes tended to indulge in an indiscriminate reliance on precedents which deal with categories (1) and (2) in situations which really

fall within category (3); this failure of the Tax Court to make a proper analysis of cases lying within category (3) has led to the reversal of its decisions, as often, or more often, than they have been affirmed. And we emphasize the number of reversals subsequent to the decision in this case. See cases cited in Opening Brief, page 24.

8. In view of the indefensible position that the Commissioner here takes it is not surprising that it seeks to take refuge in the proposition that there is no question of law for this Court to pass on. (Comm's Br. pp. 30-31.) We pointed out in our opening brief (pp. 23-27) that the applicability of Section 117(j) presents, at best from the Commissioner's viewpoint, an ultimate question of fact which itself involves the legal significance of evidentiary facts, and is, accordingly, "subject to review free of the restraining impact of the so-called 'clearly erroneous' rule." *Lehmann v. Acheson*, 206 F. 2d 592, 594 (C. A. 3); *Baumgartner v. United States*, 322 U. S. 665, 670, 671; *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217, 219 (C. A. 5); *Curtis Company v. Commissioner*, *supra*; 5 Moores' Federal Practice, 2d Ed., Sec. 5203(3); *Cf.*, this court's decision of February 28, 1957, in *Earle v. Woodlaw* on an analogous issue under Section 115(c) and 115(g) of the Internal Revenue Code of 1939. Characteristically, the Commissioner's brief meets this issue by ignoring all of the authority which we cite.

But we see no reason to attempt to lead this Court into a semantic labyrinth on the distinction between law and fact, because even if the "clearly erroneous" standard is applicable, the case must be reversed. The meaning of that phrase as stated by the Supreme Court in *United*

*States v. United States Gypsum Co.*, 333 U. S. 364, 395, is simply that "A finding is 'clearly erroneous' when although there is evidence to support it the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

Judged by that standard we confidently submit that this case should be reversed.

June 10, 1957.

Respectfully submitted,

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